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Clemency for Battered Women Who Kill Their Abusers: Finding a Just Forum

Alison M. Madden

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Clemency for Battered Women Who Kill Their Abusers: Finding a Just Forum

by Alison M. Madden*

INTRODUCTION

A large number of battered women in California prisons have petitioned Governor Pete Wilson for pardon or for commutation of their prison sentences to time already served. Most of these women were sent to prison for killing their abusers in defense of themselves or their children. The legal, political, and social forces¹ that influence the criminal trials of such women frequently ensure high conviction rates and stiff sentences.² This is true despite efforts to show juries and trial courts that many battered women who kill do so out of a reasonable fear that they will suffer death or bodily harm that they consider imminent. Most convictions of battered women who kill result from a failure to account for these reasonable perceptions and reactions and are therefore unjust.

Governor Wilson can ensure that battered women incarcerated for killing their abusers receive a full, fair, and principled review of their cases. The governor should recognize the bias in the definitions and application of the law of self-defense that results in more convictions and harsher sentences for battered women. To ensure that justice is done, Governor Wilson should work with the legislature and Board of Prison Terms to release as many battered women in prison as is consistent with

* B.A., Journalism, B.A., French, St. Louis University; Class of 1993, University of California - Hastings College of the Law. I would like to thank Moana Kutsche, whose comments and suggestions were extremely valuable in bringing this article to print. I would also like to thank my parents, my sisters, and my friends, especially Rachel Kook and Ty Hyderally, for an inordinate amount of support and patience. In doing the research for this article I became involved with, and served as a volunteer at, the California Coalition for Battered Women in Prison. However, any opinions expressed, and any statements or misstatements of fact, must be regarded as my own and in no way reflect the position of the Coalition or any of the individual petitioners.

1. See *infra* notes 153-82 and accompanying text for discussion of legal, social, and political factors that contribute to convictions in battered women's cases.

2. See *infra* notes 291-92 and accompanying text for discussion of disproportionate sentencing and high conviction rates.

the public interest, safety, and welfare through the use of the executive clemency power.

Commuting the sentences of battered women who killed in self-defense is a legitimate exercise of the executive clemency power.³ Clemency can be used to rectify unjust results in individual cases that have not been cured through the judicial channels upon which we normally rely to accommodate changes in the law.⁴ It can correct general failings of our criminal justice system⁵ that arise from inequities in our society.

Governor Wilson responded to the petitioners and informed them, "Normally, [the governor's] office does not consider applications for executive clemency for individuals currently under sentence except on grounds of either extreme and unusual hardship or innocence."⁶ Contrary

3. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardon Power from the King*, 69 TEX. L. REV. 569, 613 (1991) [hereinafter Kobil, *Mercy Strained*] ("Clemency, properly exercised and freed of political pressures, represents an ideal vehicle for remedying many of the problems inherent in an imperfect, overloaded, . . . rigid system of criminal justice").

4. "Changes in the law" include adopting flexible substantive criminal law definitions already used in a majority of jurisdictions, see *infra* notes 74-152 and accompanying text, and changing attitudes that result in prosecutors, judges, and juries more fairly applying the existing self-defense construct to battered women's cases.

The belief that our adversarial system of justice is the only proper forum for accommodating changes in the law is held by prosecutors, among others. See Lee Leonard, *Celeste Commutes Sentences of 25 "Battered" Women Felons*, UPI, Dec. 22, 1990, available in LEXIS, Nexis library, UPI file [hereinafter Leonard, *Celeste Commutes 25*] (quoting Cuyahoga County assistant prosecutor Henry Hillow that clemency is a "total betrayal of how the jury system is supposed to work" and quoting Ashtabula County prosecutor Gregory Brown that it was "improper for Celeste to legislate away what a jury has found"). See also Janet Naylor, *Schaefer Releases Fears, Too*, WASH. TIMES, Feb. 21, 1991, at A1 [hereinafter Naylor, *Schaefer Releases Fears*] (John Scully, counsel for the conservative Washington Legal Foundation, is concerned that clemency decisions subvert the judicial process and give free rein to kill — in his view a private right "to impose the death penalty on [abusers]" — and Jon Ryan of the National Coalition of Free Men thinks the Maryland clemency decision "sets a dangerous precedent").

In response to the granting of clemency by Maryland Governor William D. Schaefer, see *infra* note 8, a newspaper editorial board claimed that the governor "single-handedly overturned the criminal justice system by ignoring the evidence from . . . trials." *The Gov Blunders Again*, WASH. TIMES, Mar. 20, 1991, at G2.

The emphasis placed on a "jury of one's peers," and the availability of appellate review, reveals that many do not see executive clemency as a valid exercise to correct injustice that persists in the trial and appellate courts. A deputy United States pardon attorney during the Carter, Reagan, and Bush administrations stated, "It's a dangerous trend for the executive to override the function of the courts and the parole system too much, both from the point of view of balance of power and of possible corruption." Kobil, *Mercy Strained*, *supra* note 3, at 603.

5. These results include disparate and disproportionate sentences, *infra* notes 291-92. See also Part II, *infra*, for discussion of application of legal construct of self-defense to battered women, and *infra* notes 153-82 and accompanying text for discussion of political and social forces influencing verdicts.

6. Letter from Janice Rogers Brown, Governor Wilson's legal affairs secretary, to

to the governor's view, the appropriate justification for the exercise of clemency in these cases is to secure justice by correcting the jury's (or the trial court's) misapplication of a legal theory of self-defense that has often proven inadequate to account for the experiences of battered women. The clemency power should not be limited to extending "mercy" to women who should no longer be imprisoned because of poor health, age, or other individual factors.⁷ Moreover, the admissibility of expert testimony on the battered woman syndrome should not be the sole factor considered in determining whether a battered woman received a full and fair opportunity to establish that she acted in self-defense,⁸ and it should not be the controlling consideration in deciding clemency petitions.⁹

There are political risks inherent in using the clemency power to redress the failings of the judicial system. However, Governor Wilson can share these potential risks with the California Legislature and the Board of Prison Terms. He should do so by adopting principled standards for review of the cases in which battered women are imprisoned for killing abusers. He should also consider delegating the power to decide clemency petitions of incarcerated battered women to an independent body that is

the leader of Convicted Women Against Abuse at Frontera Prison (Feb. 17, 1992) (on file with author) [hereinafter Wilson Letter]. See also Part III, *infra*, for discussion of executive power of clemency.

7. In addition to Governor Wilson's position, *id.*, see Geraldine Baum, *Should These Women Have Gone Free? Backlash: Second Guessing Dogged Governors in Maryland and Ohio After They Granted Clemency to Wives Who Killed Men They Said Abused Them*, L.A. TIMES, Apr. 15, 1991, at E1 [hereinafter Baum, *Backlash*] (quoting individuals from House of Ruth, the Maryland clemency support group, and Paul Davis, Maryland's parole commissioner, who stated that the task is to "look at the gray area and decide whether to grant mercy").

8. See *infra* notes 183-246 for critique of battered woman syndrome as a distinct psychological and behavioral model and as an effective means of winning acquittal.

9. Both governors who have commuted sentences of battered women as a group, see *infra* notes 11-12, have indicated that they did so because either battered woman syndrome testimony or evidence of prior beatings had not been admissible in those states at the women's trials. Kathy M. Kristof, *The Trials of Abused Women, Clemency Efforts for Battered Women*, ATLANTA J. AND CONST., Apr. 26, 1992, at A7 [hereinafter Kristof, *Trials*]; Naylor, *Schaefer Releases Fears*, *supra* note 4; Gary Spencer, *Legislators Seek Release of Women Prisoners*, N.Y.L.J., Mar. 5, 1991, at 1; Isabel Wilkerson, *Clemency Granted to 25 Women Convicted for Assault or Murder*, N.Y. TIMES, Dec. 22, 1990, at A1; Celeste Discusses Clemency Issue On Talk Show, UPI, Dec. 26, 1990, available in LEXIS, Nexis library, UPI file; *Clemency for Battered Women*, 1:1 DOUBLE-TIME (Nat'l Clearinghouse for the Defense of Battered Women (NCDBW)) Oct. 1991, at 1 [hereinafter *Clemency for Battered Women*, DOUBLE-TIME]; *Only Guilty of Being Scared; Ohio Governor Commuting 25 Sentences, Revives Battered Women Issue*, L.A. TIMES, Dec. 31, 1990, at B4 [hereinafter *Only Guilty*]. Legislators in both states have passed bills allowing for the admission of such testimony at trial. It is now admissible in Ohio by court decision, *State v. Koss*, 551 N.E.2d 970 (1990), and by statute, OHIO REV. CODE ANN. § 2901.06 (Baldwin 1992); in Maryland it is admissible by statute, MD. CTS. AND JUD. PROC. CODE ANN. § 10-916 (1991).

free from direct political pressure, and he can enlist the legislature in this regard.

In Part I of this article, I introduce some of the women who have petitioned Governor Wilson for commutation of their prison sentences. The petitioners organized a battered women's support group in prison, applied for clemency, and in turn sparked a movement in the community to aid them in their plea. Part II describes the application of self-defense law to women who defend themselves against their abusers, with a focus on the legal rules in California. I criticize the overreliance upon the battered woman "syndrome" as a distinct behavioral model and as an effective tool for securing acquittals. A review of the syndrome is followed by a survey of some of the criticisms of battered woman syndrome and some alternative explanations for battered women's actions. Part III presents an overview of theories of punishment and the executive power of clemency, with suggestions for the principled use of the power to achieve justice. Finally, I recommend that the governor, through the Board of Prison Terms or a separate executive commission, identify and review the cases of all women who are incarcerated for killing or assaulting those who battered them.¹⁰

I. CALIFORNIA WOMEN IN PRISON SEEKING COMMUTATION

A. BACKGROUND

Governors in two states have released from prison a number of battered women who killed their abusers. In December of 1990, Governor Richard F. Celeste of Ohio granted clemency to twenty-five battered women, including one on death row. He announced his decision to release the women two weeks before his term expired.¹¹ Governor William D. Schaefer of Maryland granted clemency to eight women two months later, in February of 1991.¹² In making their decisions, both

10. It is conceivable that men kill women in self-defense in cases in which the woman has been the batterer over the course of the relationship. However, this article assumes that this is an extremely rare occurrence. A recent statistical report released by the Justice Department's Bureau of Justice Statistics reveals that violence against women is six times more likely to be committed by intimates than is violence against men. Tamar Lewin, *25% of Assaults Against Women Are by the Men in Their Lives*, N.Y. TIMES, Jan. 17, 1991, at A20 (reporting on study and giving statistics). Only four percent of violent crime committed against men is committed by family members or women the men had dated, but twenty-five percent of violent crime against women is committed by family members or men the women have dated. *Id.*

11. *Clemency for Battered Women*, DOUBLE-TIME, *supra* note 9, at 1 (reporting twenty-six commutations); Wilkerson, *Clemency Granted to 25*, *supra* note 9 (reporting twenty-five commutations).

12. *Clemency for Battered Women*, DOUBLE-TIME, *supra* note 9, at 1; Janet Naylor,

governors gave great weight to the fact that these women had not had the opportunity at trial to present evidence of either battered woman syndrome or a history of abuse, because neither state permitted the use of such evidence.¹³

Governors in other states have commuted sentences or pardoned prisoners on an individual basis.¹⁴ Other than the two "mass" clemencies

Schaefer to Free 8 Battered Women Who Fought Back, WASH. TIMES, Feb. 20, 1991, at A1 [hereinafter Naylor, *Schaefer to Free 8*].

13. See *supra* note 9.

14. These individual cases include the following:

Illinois: Governor James Thompson (Republican) commuted the sentences of Gladys Gonzales and Leslie Brown on December 23, 1988. It was Gonzales's second petition for clemency. She had been convicted of solicitation and conspiracy to commit murder for the killing of her husband. See Petition Advising the Honorable James R. Thompson, Governor of Illinois, in the Matter of Gladys Gonzales, prepared by counsel for petitioner, for a description of the years of abuse suffered by Gladys (on file with *Hastings Women's Law Journal*) [hereinafter Gonzales petition]. See also Kristof, *Trials*, *supra* note 9 (reporting that six battered women in the 1980s were released by Illinois governors).

Florida: In December of 1990, then-Governor Robert Martinez (Republican) commuted the sentence of a woman convicted of hiring a man to kill her abusive husband in 1975. *Clemency Update*, 1:1 DOUBLE-TIME (Nat'l Clearinghouse for the Defense of Battered Women (NCDBW)) Oct. 1991, at 6 [hereinafter *Clemency Update*, DOUBLE-TIME].

New Hampshire: Then-Governor John Sununu (Republican) granted a conditional pardon in 1988 to Kathleen Kaplan, who pled guilty to second-degree murder and received a sentence of thirty years to life for soliciting the killing of her husband. Laura A. Kiernan, *Pardon Granted in New Hampshire Murder-For-Hire Case*, BOSTON GLOBE, Dec. 8, 1988, at M29.

New York: Governor Mario Cuomo (Democrat) granted clemency in 1986 to Luz Santana, who had been sentenced to fifteen years to life in prison for killing her abuser (her stepfather), who she said had physically and sexually abused her family for twelve years. Spencer, *Legislators Seek Release*, *supra* note 9.

Iowa: Governor Terry E. Branstad (Republican) commuted the sentence of Katherine L. Sallis on February 12, 1992. She had received a sentence of life in prison but was released after public hearings were held (which she was unable to attend) at which ninety-five percent of those present supported the commutation. Katherine L. Sallis, Address at the Statewide Conference on Battered Women (San Francisco, Cal. Aug. 15, 1992).

Washington: Governor Booth Gardner (Democrat) granted clemency to Delia Alaniz, convicted of hiring a hitman to kill her abusive husband. She did so after seventeen years of sexual, physical, and mental abuse by her husband. He had also threatened to rape her fifteen-year-old daughter. Robert McDaniel, *Killer of Abusive Husband Granted Clemency*, UPI, Oct. 27, 1989, available in LEXIS, Nexis library, UPI file.

Nebraska: The Nebraska Board of Pardons granted a full pardon to Judy Sturm, a battered woman convicted in 1972 of manslaughter for killing her sleeping husband after he beat her and threatened to strangle her with a telephone cord. The board pardoned her years after her release and after she dedicated herself to helping battered women at a Nebraska task force on abused women. UPI, Mar. 16, 1989, available in LEXIS, Nexis library, UPI file.

Other states whose governors have granted clemency to battered women include

in Ohio and Maryland, these individual actions resulted in approximately a dozen other battered women receiving clemency.¹⁵ According to recent news reports, clemency drives of differing sizes are under way in more than twenty states, including Florida, Illinois, New Hampshire, Tennessee, Washington, Michigan, Massachusetts, and Texas.¹⁶

On March 19, 1991, thirty-four women in the California Institution for Women at Frontera, California, met and drafted a letter petitioning Governor Pete Wilson to review their cases and to meet with them at the prison.¹⁷ In that letter, they requested clemency in the form of pardons or commutation of their sentences to time served. After receiving the letter, Governor Wilson announced that he would review the trial record and additional information provided in individual petitions on behalf of each woman who had signed the letter. Although he extended the deadline for submission of these petitions, he declined to meet with the women.¹⁸ It is Governor Wilson's policy to conduct hearings only in capital cases,¹⁹ and none of the petitioners' cases is a capital case. However, hearing the stories first-hand and seeing the women can be a powerful experience that could have a strong, positive influence on the governor's decision.²⁰

Louisiana, Tennessee, and New Jersey. Maria Puente, *Texas Considers Clemency: Will Review Cases Related to Abuse*, USA TODAY, May 17, 1991, at 3A; *Florida Considers Clemency*, USA TODAY, Sept. 13, 1991, at 3A.

15. Richard Barbieri, *Battered Women Push for Clemency Program; Bay Area Counsel Establish Coalition To Aid Prisoners*, THE RECORDER, Dec. 3, 1991, at 1 [hereinafter Barbieri, *Push for Clemency*] (quoting Sue Osthoff, director of NCDBW, *see supra* note 9, stating that only twelve had been granted). *See also* Puente, *supra* note 14 (reporting that approximately three dozen women (including Celeste's twenty-five) have been released by governors over the past three years).

16. Gina Boubion, *Battered Women Appeal For Clemency: Those Who Killed Abusive Mates Feel They Have Suffered Enough*, SAN JOSE MERCURY NEWS, Mar. 1, 1992, at 1A; Candy J. Cooper, *Deadly Defense: Women Who Kill Abusers*, S.F. EX-AM., Aug. 30, 1992, at A1 [hereinafter Cooper, *Deadly Defense*]; Jane Gross, *Abused Women Who Kill Now Seek a Way Out of Cells*, N.Y. TIMES, Sept. 15, 1992, at A16; Kristof, *Trials*, *supra* note 9.

17. Letter from Petitioners to Governor Wilson (Mar. 19, 1991) (on file with *Hastings Women's Law Journal*); FACT SHEET ON THE CALIFORNIA COALITION FOR BATTERED WOMEN IN PRISON (Cal. Coal. for Battered Women in Prison, San Francisco, Cal., Los Angeles, Cal.) Fall 1992, at 1 (on file with *Hastings Women's Law Journal*) [hereinafter FACT SHEET].

18. Gross, *supra* note 16 (the petitioners' invitation to meet with the governor received a "polite 'no thank you'").

19. Telephone Interview with Minouche Kandel, California Coalition for Battered Women in Prison (Dec. 21, 1992).

20. *See* Cooper, *Deadly Defense*, *supra* note 20. Cooper recounts how California Assemblyman John Burton (D-San Francisco), head of the Assembly Public Safety Committee, was especially affected by the testimony he heard from eight women in the hearings at the prison in September 1991. During the course of "bloodcurdling" testimony, Burton scribbled a note to Assemblywoman Jackie Speier (D-So. San Fran-

The prisoners' group, Convicted Women Against Abuse, was formed in 1988 by eighty-four-pound Brenda Clubine, who has been in jail nine years for killing her husband, an ex-police officer, with a champagne bottle.²¹ Because Clubine heard "echoes of her story" from other inmates,²² she sought to organize a support group for formerly battered women in prison. After three years of fighting the prison bureaucracy to establish the right to meet, the group now assembles every Wednesday evening. Its membership has grown from ten to forty-four, and includes women between the ages of twenty-five and seventy-seven. In the weekly group support sessions the prisoners talk about their battering experiences, the loss of the men they loved and what went wrong.²³ They offer support to one another in the meetings through understanding and acceptance. Part of the importance of the support group, as one of the founding members stated, is that "[n]obody asks, 'Why did you go back?' They just understand."²⁴ The women receive certificates for continued attendance. All of the thirty-four group members at the time the letter was written joined in the bid for clemency.²⁵ Most of them were in prison for killing their abusers. As of May 8, 1992, twenty-two of the women had formal, individual petitions submitted by *pro bono* advocates, and an additional twelve petitions had been filed with the governor as of December 1992.²⁶ Approximately 600 of the more than 6,000 women in Cal-

cisco) that read, "I'm glad you forced me to come." Burton has since written legislation that would have affected battered women and the clemency process. The bill was vetoed by Governor Wilson. See *infra* notes 388-410 and accompanying text. See also Howard Schneider, *Meeting Battered Women Face to Face; Schaefer Ends Prison Visit With Call for New Laws, Parole Study*, WASH. POST, Jan. 15, 1991, at B7 (reporting that Maryland Governor Donald Schaefer was moved after speaking with the women in prison).

21. Cooper, *Deadly Defense*, *supra* note 16.

22. *Id.*

23. Susan Paterno, *A Legacy of Violence; The Courts Say They are Killers But They Say They Were Abused and Had No Other Way Out*, L.A. TIMES, Apr. 14, 1991, at E1.

24. *Id.*; Gross, *supra* note 16 (quoting one woman: "[U]nlike the police stations where they filed complaints against their husbands and the courtrooms where they were tried, nobody asks: Why did you put up with it?").

25. It should be noted that not all of the women in prison for killing abusers, nor all those with histories of abuse, could possibly be represented in the support group. As a result, the governor may possess an initial pool of petitions that does not accurately reflect the diversity of the women's prison population.

26. Telephone Interview with Minouche Kandel, California Coalition for Battered Women in Prison, *supra* note 19. See *infra* notes 28-40 and accompanying text for reviews of some of the cases and *infra* notes 46-54 and accompanying text for discussion of the Coalition providing legal and other assistance to the petitioners.

Although thirty-four women originally signed the letter, the advocates who have filed petitions on their behalf (members of the California Coalition for Battered Women in Prison) determined that they would file full petitions and supporting materials for only those women whose cases showed the following factors: 1) a woman con-

ifornia prisons are in prison for murder or manslaughter, and it is estimated that several hundred of these women killed abusers in self-defense.²⁷

B. THE PETITIONERS

Narrated here are the stories of three of the petitioners included in the initial round of petitions sent to Governor Wilson followed by a summary of news accounts of two others.²⁸ Although each of the petitions is summarized with permission, the summaries are anonymous both to protect the petitioner and to ensure the confidentiality of the clemency process, as none of the petitions is public record.²⁹ These stories attempt to present the killings in the context of the relationships. It is important to understand the history of abuse and what the woman thinks is coming (immediately or in the near future) when she acts. The accounts contain information from the women that may not have been admitted into evidence at trial. The petition review committee of the California Coalition for Battered Women in Prison read thirteen petitions in one day and the remaining eight as they arrived periodically over the next week. Needless to say, the experience was sobering. These stories challenge our ideas of what it is like to be a battered woman and make us reconsider the thought that most non-battered women can identify with these women, with their childhoods, and with their experiences in marriage.

Many reporters do not describe the batterings that preceded the kill-

victed of murder or manslaughter, 2) evidence of battering in the relationship with the decedent, and 3) exhaustion of all appeals. Twenty-two of the original thirty-four met these "requirements." Telephone Interview with Minouche Kandel, California Coalition for Battered Women in Prison, *supra* note 19. Advocates did *not* determine that these twenty-one women suffered from "battered woman syndrome," as some articles have supposed. See, e.g., Candy Cooper, *It Started Small, But Coalition Flourishing*, S.F. EXAM., Aug. 30, 1992, at A9 [hereinafter Cooper, *Coalition Flourishing*] (stating that the California Coalition advocates identified twenty-one women whom they believe *fit the profile*) (emphasis added); Gross, *supra* note 16 (asserting that the "team of lawyers . . . determined that 22 women in Ms. Clubine's group were candidates for clemency: *they met the accepted definition for battered women's syndrome*, had killed abusers and had exhausted appeals") (emphasis added). The battered woman "syndrome" does not appear ever to have been viewed by the Coalition as something the potential petitioner must exhibit before receiving assistance from the Coalition.

27. FACT SHEET, *supra* note 17, at 3; Telephone Interview with Minouche Kandel, California Coalition for Battered Women in Prison, *supra* note 19.

28. Petitions of three unnamed prisoners from initial group seeking commutation, submitted to Governor Wilson April, 1992.

29. I contacted several of the petitioners or their advocates in deciding which stories to present. None of the cases is presented to gain an advantage, to put pressure on the decision-making process, or because the story is "better" than any other. The cases summarized from the petitions, along with the news accounts of two higher-profile petitioners (Brenda Clubine organized the support group and has been a vocal advocate, and Brenda Aris was the defendant in a published appellate court opinion), are intended only to show the range of cases before the governor.

ings when writing news accounts. Instead, they relate the case history in an abbreviated and sanitized manner, such as: "On August 9, 1991, after fifteen years of abuse and after an argument in which the defendant's husband stated he would 'kill her and the kids,' Mrs. Jones picked up a rifle and fired at her husband as he approached her." Such an incomplete account of a woman's experience and her self-defensive act makes it tempting to immediately decide — using our own lives as a reference — that the woman's actions could not have been reasonable. Or we rationalize and conclude that even if she should not be convicted of murder, manslaughter is appropriate. However, when faced with the entire tale of abuse — how it began, how it escalated, the degree of violence, and the continuity — the woman's action becomes more understandable and reasonable, and her assertion of self-defense appears more credible.³⁰

For example, compare the following two news accounts of Lisa Grimshaw, convicted of hiring two men to kill her husband. The first contains a brief description of the killing and then criticizes the application of the battered woman syndrome to cases in which third parties are hired to kill the abuser:

One summer night in 1985, Lisa Grimshaw watched her boyfriend put two baseball bats in the trunk of her car, then drove him and another man to a secluded boat ramp and dropped them off. Next she picked up her estranged husband from work, drove him to the boat ramp, and told him she wanted to have sex. When he got out of the car, the other two men emerged from hiding and beat him to death. Ordinarily [self-defense] wouldn't be a plausible defense for someone who sought out another person and escorted him to an ambush killing. But Grimshaw's attorneys told the jury that, *after years of physical abuse and harassment* at the hands of her estranged husband, she suffered from "battered woman syndrome." This mental disorder, they said, caused her to believe that her life was in imminent danger and that alternatives to having her husband beaten with baseball bats were not available.³¹

The following account more fully describes the violence endured by Grimshaw and her earlier attempts to take advantage of the "alternatives to the ambush killing."

30. For a full discussion of battering histories in cases with reported court decisions, including some of those cited *infra* notes 238, 244 see CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 1-30 (1989).

31. Nancy Watzman and William Saletan, *Marcus Welby, J.D.: When Doctors Become Judges*, THE NEW REPUBLIC, Apr. 17, 1989, at 19 (emphasis added).

In the beginning, he was sympathetic, but the violence soon began. She says he held a knife to her belly and threatened to carve out her fetus. "He used to make me sit down in the corner of the room and sprinkle boiling water on me so I would perform oral sex 'cause he told me if I didn't he would pour the water on me. He arrived one night while I was hammering the window shut. I was using big nails so he couldn't get in. I was backed into the corner of the room and he knocked my teeth out with the hammer. That wasn't the first time, and I have dentist records to prove it. One time I went downstairs, and he had a gun, and I said, 'Well, you just . . . kill me; it really doesn't matter anymore.' I really didn't care if I lived anymore. I tried to get help from the system and nobody would help me. My family was useless. The cops took him out, and he would come back. He would put things inside of me and tie me up in bed and he said if I didn't do things, he would kill me. Of course I believed him." She had left him, had hid from him and had called the police, who failed to help her. After the murder, she stated, "If the cops had helped me, maybe he'd be alive today . . . It was me or him."³²

Although the full stories may not convince everyone — and indeed do not convince all juries — it is important to know the entire context of a woman's action rather than a trivialized description such as "physical abuse and harassment."³³

Some battered women's stories are worse than others. However, it is important that we not reserve the defense of self-defense, and clemency, for only those with the most horrific tales. We must consider what it must have been like to be the woman in any of these situations. We must ultimately judge whether her act was reasonable, not merely whether she had a paradigm "battered woman's" case.

Prisoner #1

D was convicted of second-degree murder and sentenced to seventeen years to life in prison for shooting her boyfriend, B.³⁴ D had been se-

32. Stan Grossfeld, *Love and Terror: "Safer" and in Jail: Women Who Kill Their Batterers*, BOSTON GLOBE, Sept. 2, 1991, at M1.

33. Watzman and Saletan, *supra* note 31, at 19.

34. Identifying the women as "D" (defendant) and as "prisoner" serves as a good reminder of how the state aligns itself against women whom it has rarely endeavored to protect before the killing of the abuser.

"B" signifies a boyfriend and "H" a husband. Although I regret having to use such letters to identify the parties, it is necessary to protect the prisoners' privacy and to ensure that the women who apply for clemency are not exploited. Exploitation

verely abused physically by her boyfriend for more than two years. B began abusing D emotionally, blaming her for his inability to hold a job, calling her stupid, a whore, and a slut. Before long, physical violence replaced the emotional abuse. B would hit and kick D during arguments and once stabbed her in the back four times. D often attempted to fight back, but could not because she was much smaller and not nearly as strong as B. A doctor had concluded that B "was a powderkeg waiting to go off." B's abuse of D became more erratic and severe.

D never called the police, but others did in response to her cries for help. Once when the police arrived B had D on the floor, with his hands around her neck, strangling her. The police only asked B to cool down by walking around the block. Once he severely beat and kicked her in public, prompting four young girls who witnessed the attack to call the police. B was not arrested.

On the night of the killing, D told B she was leaving him. She had made plans to leave earlier that day. She had also told a friend at dinner that night that she was afraid to go back to the trailer in which D and B lived. Once the two returned home — and after a fight erupted in which B had begun to push D around and to the floor — B loaded a shotgun and informed D that he was going to kill the dog, then kill D, and then kill himself. He told her to put a bucket over the dog's head. He then threatened to tie D to his pickup truck and drag her to the home of X (a man whom he had accused her of being interested in) to see "how [he] liked her then." B aimed the gun at D, who was able to wrestle the gun away from B and point it at him. He advanced toward her, and said, "When I get that gun, I'm going to kill you with it." D then shot B. She was found hours later, bruised, scratched, and in shock, still holding B in her lap, rocking him. At D's first trial, evidence of abuse was admitted. However, her attorney disappeared during trial, and that trial ended in a mistrial. When the judge polled the jury at that time, seventy percent of the jurors indicated that they would have acquitted her based upon the testimony they had heard. D's second attorney failed to offer evidence of abuse and she was convicted of second-degree murder.

Prisoner #2

D had a history of childhood abuse. She was raped at age thirteen and became pregnant. She was forced by her parents to marry the man who had raped her after she decided to keep the baby. D left that relationship because her husband was abusive. She later married a second abusive man and left him. She began dating B, whom she met at her

through excessive publicity, and a backlash of negative publicity, have harmed clemency efforts in other states. See *infra* notes 53, 350-57.

apartment building. Despite a peaceful initial relationship, B soon became violent, verbally and physically abusing D when she refused to give him money for drugs. B once smashed the windows in her apartment with a baseball bat after she refused to give him money. D reported the beatings (as many as four per week) to the police but was told that because the police did not witness the incidents they could do nothing for her.

B would usually kick and hit D in places where marks would not be visible, but sometimes he choked her. Although D called the police often in the last six months of the relationship, B was never arrested. Once B was removed to a house a few houses away from D's. He returned within fifteen minutes, threatened her and threw her to the floor, telling her, "Bitch, you're going to pay for this." He warned her not to call the police again and beat her.

When B was sent out of town by his mother, D began seeing another man. When B returned he threatened D, called her a slut and a whore, and said that no one could have her but him. He hit D on the head with a glass bottle, attempted to strangle her, and swore that he would kill her and her new boyfriend. A few days later B confronted D's new boyfriend with a pistol and chased him off. He then shoved his way into D's apartment, struck her, and drew the pistol. He stated that he would be back to kill her. As he left, D picked up a rifle, followed B, and warned him not to return. He responded with obscenities and began to approach her with the pistol drawn. D fired once and killed B. She was convicted of second-degree murder. No evidence of prior abuse was admitted at her trial, and she had no prior record. She is serving a sentence of fifteen years to life.

Prisoner #3

D was convicted of first-degree murder and received a sentence of twenty-five years to life. For five years, D was forced to participate in bizarre sex acts and was physically abused and emotionally tormented. Shortly after the beginning of their relationship, H began to dominate D and insisted that she abort her first pregnancy or he would leave her. He repeatedly accused her of infidelity, concocting bizarre tales of sex in vans with multiple partners. After a party in which a man had rested his hand on the couch behind D's shoulder, H accused D of having an affair with the man, whom she had never met. When they returned home, H ripped off D's clothes and raped her. On one occasion he suspected her of infidelity when she returned home a half-hour late from an appointment; he ripped off her skirt and underwear to determine if she had been with another man and raped her. She was still holding her purse in her hand. H ordered her to get up and fix dinner after the attack.

H often tried to force D into three-way sex with former girlfriends and prostitutes. She was disturbed and deeply offended by this. The

abuse shifted from emotional and sexual violence to other forms of physical violence, including pushing, slapping, and ripping off D's clothes. H tried more than once to push D outside naked. She would respond by locking herself in the bathroom, sometimes spending the night there. D could predict when the abuse would start. H would become silent, then he would launch into a tirade, calling D a bitch, whore, slut, and stupid. He would throw plates and furniture, and push, slap and shove her. He began to play pornographic movies during sex and demanded that she imitate the acts in the videos.

On the night of the shooting, H returned from a week-long absence with renewed demands that D engage in three-way sex with H and a prostitute. When she said she could not, H beat her. She fled. When she returned home later that night, H told her to pack. She packed, made dinner, and H went to bed. Until three o'clock in the morning she tried to gain the courage to kill herself, but could not. She entered the bedroom, planning to kill herself there. Instead, she shot H. She sat in the living room all night, terrified that he would be angry and come to get her.³⁵ In fact, at one point she was so frightened that she was certain that she saw him, or what looked like his spirit, coming down the hall. She thought he was coming to get her. D was convicted of first-degree murder and sentenced to twenty-five years to life. D's attorney never offered evidence of prior abuse, and her case was never appealed. She has served ten years of her sentence. The prosecutor who tried the case is recommending commutation.

Prisoner #4

Brenda Clubine³⁶ is the founder of Convicted Women Against Abuse, a group that meets at the California Institution for Women, at Frontera, California.³⁷ Clubine's husband, an ex-police officer, stabbed her, broke her bones, fractured her skull, and tore the skin off her face, all during repeated instances of abuse over several years. "I've pretty much gone through just about all of it," Clubine says. She bears a scar on her hand from a time when she deflected a knife wielded by her husband. Most of these battering instances occurred despite the fact that Clubine had several restraining orders issued against her husband. "Every

35. Many of the women in the group of petitioners expected the batterer still to be alive and to come after them, believing them to be of super strength and indestructible. Petitions of unnamed prisoners from the initial group seeking commutation, submitted to Governor Wilson April, 1992.

36. This statement of Brenda Clubine's story of abuse is drawn from Boubion, *supra* note 16; from Cooper, *Deadly Defense*, *supra* note 16; from Candy Cooper, *Inmate Fighting For Clemency For Herself and Other Prisoners*, S.F. EXAM, Aug. 30, 1992, at A9; and from Gross, *supra* note 16.

37. See *supra* notes 17-27 and accompanying text.

time he was in violation of the restraining order, whether it was because he vandalized our house or physically beat me, the police wouldn't do anything. They came to my home, they would meet my husband in the driveway and he would just tell them I was being emotional. They wouldn't talk to me. . . . [I] had to call [the district attorney] every day for six weeks to try to get them to file charges."

Clubine met her former husband at a restaurant on the night that she killed him. He was supposed to hand over signed divorce papers. When she arrived, he said he had forgotten them at his hotel room, and she agreed to go there with him. Once there, he locked the door. He had a copy of a warrant issued for his arrest and told her she was not going to make a fool of him. He told her to take off her wedding ring so nobody could identify her body, and he slapped and choked her. He stated that he would kill her and that nothing would happen to him. She promised him she would drop the divorce proceedings and the charges against him. She then put three Benadryl capsules in his wine and began to rub his back. She grabbed the wine bottle and hit him on the head and stabbed him twice before leaving the hotel room. She called his house for three days, expecting that he would be angry and come to her house to confront her. The last time she called, the police answered his phone; they came to her house to notify her of his death, and a few days later arrested her. She was convicted of second-degree murder and received fifteen years to life in prison.

Prisoner #5

Over several years of marriage, Brenda Aris³⁸ lived in fear of her husband's violent outbursts. He once returned home from a night of drinking and hit Aris while she was sleeping, fracturing her jaw. Another time he came home and hit Aris as she slept, slitting her eye. He beat her routinely, and once broke her ribs. On the day she was to undergo a hysterectomy, her husband was angry with her because she would not be able to bear a son. He beat her so severely as they drove that she was forced to jump from the moving car. Once he got angry at their newborn child for wetting on his leg and he placed the baby outside on the landing at the top of a steep flight of stairs, and would not let Aris retrieve the infant. Aris's husband threatened her at various times with guns and knives, and even threatened to make a bomb to blow up her family. He also attacked friends and relatives who tried to intervene on her behalf.

Aris's husband would not allow her to leave the house, and some-

38. This summary of Brenda Aris's case is drawn from Boubion, *supra* note 16; from Cooper, *Deadly Defense*, *supra* note 16; from Cooper, *Inmate Fighting For Clemency*, *supra* note 36; and from *People v. Aris*, 215 Cal. App. 3d 1178, 1184-85 (1989).

times would forbid her to shower or brush her teeth. He was constantly jealous, and threatened to kill her and her family if she ever left him. She did, however, leave him several times. Every time, he would follow her, beg for forgiveness, and promise to change. The beatings continued, however, and he eventually threatened to kill her when she left.

The day that Aris killed her husband resembled many others. He knocked her to the ground and began to beat her in front of her friends. He ordered her to go to her room until he told her she could come out. She left the bedroom to go to the bathroom. Her husband followed her and ordered her to open the door; when she did not, he kicked it in. He started to kick and hit her. One of her friends, who was still in the house offered to take one of Aris's children overnight and offered to take Aris, too. Aris agreed to let her child go with her friend, but stayed herself because she believed her husband would become furious if she left and might hurt her other friends who were still at the house and who left shortly thereafter.

Aris's husband then hit her in the stomach, causing her to curl up on the bed. He continued to beat her on the neck and head, and pulled her hair back violently. He told her he "didn't think he was going to let [her] live till the morning."³⁹ He continued to hit her until he passed out.

Aris went to the kitchen for ice for her face. When she did not see any, she went next door to a neighbor's house and saw a gun on the refrigerator. She took the gun "for protection," and returned home. She said that she believed her husband's death threat, and that even though he was sleeping, she believed this to be a short respite from the beatings. She believed he would kill her when he woke up, or that he would hurt her very badly. She fired the gun several times, and ran from the house.

Aris was convicted of second degree murder. Two jurors in her case are actively supporting her clemency bid, and the judge who sentenced her has reportedly stated that the victim "was a jackass who is better off dead,"⁴⁰ and that he would not oppose a grant of clemency to Aris.

C. COMMUNITY ACTION IN SUPPORT OF THE PETITIONERS

1. *The California Coalition for Battered Women In Prison*

In nearly every state in which women have sought clemency, a support group has formed to aid the petitioners' efforts.⁴¹ In Baltimore, the

39. Cooper, *Deadly Defense*, *supra* note 16.

40. *See id.*

41. *See supra* note 16 and accompanying text (citing sources reporting that clemency drives are underway in over twenty states). However, Ohio Governor Celeste initiated the review procedure of his own accord. *See Ohio Governor Grants 25 Abused Women Clemency*, CHICAGO TRIB., Dec. 22, 1990, at 1 ("in light of [the

House of Ruth and the Domestic Violence Task Force of the Public Justice Center assisted petitioners and prepared dossiers on prisoners, ultimately requesting clemency for twelve women, eight of whose sentences were commuted.⁴² Prisoners at the Massachusetts Correctional Institute in Framingham formed a group called Battered Women Fighting Back! in 1989 as a weekly support group for battered women in that prison. A facilitator from the "outside" helped form the group, and the agency Social Justice for Women provides educational and support services.⁴³ In addition, individuals from various community organizations are seeking to change the Massachusetts law of self-defense and to secure clemency for the prisoners on whose behalf they work.⁴⁴ In New York, a group of reform-oriented criminal justice organizations and women's groups has banded together to urge Governor Mario Cuomo to release battered women who "pose no risk to public safety."⁴⁵

In California, a diverse group called the California Coalition for Battered Women in Prison, with meetings in northern and southern California, formed to assist the petitioners. The Coalition has been described as "[o]ne of the state's hottest venues for *pro bono* [work]."⁴⁶ The Coalition formed in August of 1991, after the prisoners sent the clemency petition letter to Governor Wilson. In response to the petition letter and requests from individual inmates over a number of years, members of agencies working with battered women and with prisoners with children met to discuss strategies for helping battered women in prison.⁴⁷

Ohio Supreme Court decision allowing expert testimony at trial, Celeste] reviewed the records of over 100 women in prison for killing or assaulting a spouse or male companion").

42. *Clemency Update*, DOUBLE-TIME, *supra* note 14, at 5-6.

43. LISA SHEEHY, MELISSA REINBERG AND DEBORAH KIRCHWEY, COMMUTATION FOR WOMEN WHO DEFENDED THEMSELVES AGAINST ABUSIVE PARTNERS: AN ADVOCACY MANUAL AND GUIDE TO LEGAL ISSUES 2 (1991) [hereinafter HLS MANUAL] (reporting that eleven Massachusetts prisoners identified themselves as battered women, six of whom are at MCI-Framingham) (on file with author and available from the National Clearinghouse for the Defense of Battered Women).

44. Eight petitions for commutation of sentence have been under consideration by Massachusetts Governor William Weld since February 14, 1992, Domestic Violence Day in Massachusetts. Kristof, *Trials*, *supra* note 9.

45. Spencer, *Legislators Seek Release*, *supra* note 9. The group consists of the Correctional Association of New York, the state chapter of the National Organization for Women, and other groups. In addition, the New York Women's Foundation sent a letter to Governor Cuomo urging the release of incarcerated battered women. The letter was signed by 750 supporters. *Id.*

46. Richard Barbieri, *Women's Movement: A Coalition's Attempt To Win Freedom For Battered Women Who Have Killed Their Spouses Is Becoming One Of The Hottest Venues For Pro Bono*, THE RECORDER, Mar. 23, 1992, at 12 [hereinafter Barbieri, *Women's Movement*]. See also Barbieri, *Push for Clemency*, *supra* note 15.

47. Telephone Interview with Minouche Kandel, California Coalition for Battered Women in Prison, *supra* note 19.

Advocates from northern and southern California met at an initial "roundtable discussion."⁴⁸ These volunteers realized that the two-page clemency petition letter would not carry the cause and created the Coalition to assist battered women incarcerated for defending themselves.⁴⁹ The Coalition now has more than 150 active members who come from legal services organizations, public interest law firms, private law firms (including solo practitioners),⁵⁰ law schools, and government agencies.

Through its *pro bono* and petition review committees, the Coalition tries to meet the legal needs of the prisoners.⁵¹ The *pro bono* committee recruits and trains advocates to represent petitioners in preparing petitions and supplemental materials. The petition review committee serves a "quality control" function. By reading every petition, this committee hopes to avoid presenting directly conflicting assertions and over-broad generalizations regarding battered women and seeks to curb the temptation to rely too much on the battered woman syndrome as a "disease." Thirty-four petitions, prepared by Coalition advocates and containing supporting material, have been filed with Governor Wilson.

The Coalition's prison liaison committee seeks to identify battered women in prison for killing batterers. Members of this committee distributed a questionnaire, contacted women, and tried to build a rapport with social workers and others within the prison. They have done this to ensure the ongoing identification of and contact with battered women in prison. This committee also tries to ensure smooth relations with prison officials and arranges for visits between the petitioners and advocates.

The Coalition also serves as a focal point and source of information for the media and supporters. Its media committee was formed initially to garner positive media coverage of the clemency issue. It appears, however, that the petitioners themselves learned a valuable lesson from the group clemencies in Maryland and Ohio.⁵² In those states, criticism was sharp, especially in Maryland. In that state, a barrage of criticism fol-

48. Roundtable Discussion on Strategies to Assist Battered Women in Prison, Minutes from Meeting 3 (Aug. 7, 1991) (organized by advocates from Legal Services for Prisoners with Children, Battered Women's Alternatives Legal Advocacy Program, San Francisco Neighborhood Legal Assistance Foundation, California Alliance Against Domestic Violence, and the California Women's Law Center).

49. Telephone Interview with Minouche Kandel, California Coalition for Battered Women in Prison, *supra* note 19.

50. There has been vast *pro bono* legal and technical support from the law firms of Heller, Ehrman, White and McAuliffe; Gibson, Dunn and Crutcher; Latham and Watkins; Cooley Godward Castro Huddleston and Tatum; Pillsbury, Madison and Sutro; and Skadden, Arps, Slate, Meagher and Flom.

51. This description of the Coalition seeks to explain the scope of the community effort on behalf of the California petitions. For a detailed resource on forming a clemency group to aid battered women in prison, see HLS MANUAL, *supra* note 43.

52. See *supra* notes 11-12 and accompanying text.

lowed a few days of relatively favorable commentary after Governor William Schaefer commuted the sentences of eight women,⁵³ and this criticism resulted in a decision to be more cautious in future grants of clemency. The California petitioners have sought as much public support as possible in advance of the decisions and have aggressively sought press coverage. Both the group of petitioners and the Coalition have received a great deal of press.⁵⁴

The Coalition has continued to operate beyond the initial round of petitions and will probably continue to represent California's battered women in seeking grants of clemency after Governor Wilson's grants or denials of clemency in these cases.

53. See, e.g., Naylor, *Schaefer Releases Fears*, *supra* note 4; Fern Shen and Howard Schneider, *Freedom in a Divided World*; 8 *Maryland Women Who Killed Mates To Be Released Amid Debate Over Their Deeds*, WASH. POST, Feb. 21, 1991, at B1; David Simon and William F. Zorzi, Jr., *Schaefer Commuted Sentences Without All The Facts*, BALTIMORE SUN, Mar. 17, 1991, at 1A; David Simon and William F. Zorzi, Jr., *Case Histories Reveal Troubling Questions About Circumstances of the Crimes*, BALTIMORE SUN, Mar. 17, 1991, at 6A; *Killing the Enemy: Clemency to Battered Wives Who Killed Their Husbands Causes Controversy in Maryland*, NAT'L REV., Apr. 29, 1991, at 13 ("The push for clemencies which often turn out to be unwise and unjust . . . suggest a national delusion . . . [m]oral revulsion quickly mutates into an irrational crusade, fueled by unfalsifiable allegations").

Especially excoriating was the editorial, *The Gov Blunders Again*, *supra* note 4 (claiming the governor had been duped by the advocacy group House of Ruth and that the women released were dangerous criminals who belonged behind bars). But see Baum, *Backlash*, *supra* note 7 (quoting Maryland Parole Commissioner Paul Davis, who defended Governor Schaefer's review procedure).

54. See Richard Barbieri, *Coalition's First Success Was a Mixed Victory*, THE RECORDER, Mar. 23, 1992, at 1 [hereinafter Barbieri, *Mixed Victory*]; Barbieri, *Push For Clemency*, *supra* note 15; Barbieri, *Women's Movement*, *supra* note 46; Baum, *Backlash*, *supra* note 7; Boubion, *supra* note 16; Cooper, *Deadly Defense*, *supra* note 16; Cooper, *Coalition Flourishing*, *supra* note 26; Candy J. Cooper, *Legal System Defeats State's Battered Victims*, S.F. EXAM., Aug. 31, 1992, at A1 [hereinafter Cooper, *Legal System Defeats State's Battered Victims*]; Candy J. Cooper, *Fighting Back: Prison Network Forming Statewide*, S.F. EXAM., Aug. 31, 1992, at A9 [hereinafter Cooper, *Fighting Back*]; Candy J. Cooper, *Juror Was Tainted By Peer Pressure; Woman Admits She Should Have Stood Up to Judge, Jurors*, S.F. EXAM., Aug. 31, 1992, at A9 [hereinafter Cooper, *Juror Tainted*]; Patt Morrison, *Legislators Listen to Women Who Killed; Jurisprudence: The Officials Visit a Prison for Hearings on Whether Battered Wives Who Murdered Their Abusive Husbands Belong Behind Bars*, L.A. TIMES, Sept. 18, 1991, at A3 [hereinafter Morrison, *Legislators Listen*]; *Cruel and Unendurable Hell*, S.F. EXAM., Sept. 6, 1992, at A15 (editorial calling on Governor Wilson to review the sentences of all twenty-one petitioners); Gross, *supra* note 16; Paterno, *supra* note 23.

The Coalition has also been the subject of radio and television reporting, including: KPIX Channel 5 News, ten o'clock news, Sept. 21, 1992; Daphne Brogden, KGO radio interview, Sept. 26, 1992; ABC, Good Morning America, Sept. 28, 1992; KPFA, *You Can't Jail The Spirit, U.S. Political Prisoners, Women Who Kill in Self-Defense*, Jan. 31, 1992.

2. *The California Legislature*

A group of California legislators has also responded to the needs of battered women in prison. The California Assembly Women's Caucus, led by Jackie Speier (D-So. San Francisco), has taken a strong interest in battered women's issues. Members of the Women's Caucus, along with Assemblyman John Burton (D-San Francisco), who heads the Assembly Public Safety Committee, conducted a hearing at the prison in Frontera on September 17, 1991, to collect testimony from battered women in prison.

Assembly members have expressed an interest in enacting legislation to reform the substantive law of self-defense.⁵⁵ The legislature has reformed the Evidence Code to provide for the admission at trial of battered woman syndrome expert testimony,⁵⁶ has amended the clemency provisions of the Penal Code to allow the Board of Prison Terms to consider battered woman syndrome in making clemency recommendations to the governor,⁵⁷ and has passed legislation requiring the Board of Prison Terms to receive domestic violence training.⁵⁸ Assembly members have also unsuccessfully sought to further reform the Evidence Code by proposing bills that would admit evidence of *experiences* of domestic violence victims in homicide cases.⁵⁹ One bill would require the admission of all relevant battering evidence.⁶⁰

In addition, Assemblyman Burton introduced a bill, later vetoed, that would have affected the clemency process itself.⁶¹ Finally, after a January 1992 meeting with the Women's Caucus, Governor Wilson agreed to allow inmates until April 17, 1992, to file supplemental materials and applications for clemency.⁶² He reportedly did so after Assemblywoman Speier told him, "You might as well not even bother," in response to the

55. Morrison, *Legislators Listen*, *supra* note 54.

56. AB 785, introduced by Jerry Eaves (D-Rialto), added section 1107 to the Evidence Code. That section provides, in relevant part:

(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the physical, emotional or mental effects upon the beliefs, perceptions or behavior of victims of domestic violence (b) Expert opinion testimony on the battered women's syndrome shall not be considered a new scientific technique whose reliability is unproven.

CAL. EVID. CODE § 1107 (West Supp. 1992).

57. See *infra* notes 371-72 and accompanying text.

58. See *infra* notes 378-79 and accompanying text.

59. See *infra* notes 374, 386, 413 and accompanying text.

60. See *infra* notes 385-86 and accompanying text.

61. See *infra* notes 388-410 and accompanying text for description of proposed legislation.

62. FACT SHEET, *supra* note 17, at 1.

governor's representation that the Board of Prison Terms had at its disposal only the official record on which to base clemency recommendations.⁶³

II. SELF-DEFENSE AND THE BATTERED WOMAN "SYNDROME"

Not all killings deserve punishment, and our law does not require that all killings committed in defense of self be prosecuted. The substantive law definitions applied in self-defense instructions should be flexible enough to permit battered women to explain their actions in the situations in which they are most likely to act to protect their own lives. This section sets forth the requirements of the law of self-defense and examines the way in which these requirements may deprive a battered woman from prevailing on the affirmative defense. Many women are convicted despite credible claims of self-defense. This section examines some of the factors influencing the trials of battered women. Finally, I argue that battered woman syndrome should not be the controlling factor in determining whether a battered woman received a fair trial and whether she merits a commutation. Instead, testimony regarding other theories and explanations for a battered woman's reasonable self-defensive action should be admitted at trial and considered in a clemency review.

A. THE LAW OF SELF-DEFENSE

Generally, a homicide is classified as first- or second-degree murder or as voluntary or involuntary manslaughter.⁶⁴ Homicides committed without unlawful intent may be deemed excused⁶⁵ or justified.⁶⁶ A successful assertion of self-defense is a justification; it is a complete defense to a homicide charge and results in acquittal.⁶⁷ Under "traditional" self-defense law, a person who has killed another and who seeks to assert self-defense has the burden⁶⁸ of showing that she had a reasonable fear

63. Cooper, *Deadly Defense*, *supra* note 16.

64. See, e.g., CAL. PENAL CODE § 192 (West 1988) (also codifying the offense of vehicular manslaughter); 40 AM. JUR. 2D, *Homicide* § 54, at 348 (1968) [hereinafter 40 AM. JUR. 2D].

65. See, e.g., CAL. PENAL CODE § 195 (West 1988).

66. See, e.g., CAL. PENAL CODE §§ 196, 197 (West 1988); WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 5.7(a), at 454, § 7.1(a), at 605 (1986); 40 AM. JUR. 2D § 110, at 405.

67. See, e.g., CAL. PENAL CODE § 197 (West 1988); LAFAVE AND SCOTT, *supra* note 66, §§ 5.7 and 5.7(a), at 454-55 and § 7.11(a), at 665; 40 AM. JUR. 2D § 110, at 405.

68. See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684, 702 n.28 (1975) (holding that even though a criminal defendant may not be assigned the burden of persuasion in negating an element of a crime — in that case the absence of heat of passion on a murder charge — he may be required to meet a burden of production on his claim).

that she was in imminent danger of suffering unlawful bodily harm.⁶⁹ She must have responded with only the amount of force necessary to counter the threatened harm;⁷⁰ deadly force is sanctioned only in response to the use or imminent use of deadly force.⁷¹ In addition, she must not have been the aggressor, and in some jurisdictions she must not have had an opportunity to retreat.⁷² Despite its apparently categorical

See also Cal. Penal Code § 189.5 (a):

Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse [the killing], devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable [sic] or excusable [sic];

OHIO REV. CODE ANN. § 2901.05 (A) (Baldwin 1992): "... The burden of going forward with the evidence of an affirmative defense [defined as a defense involving an excuse or justification], and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused."

In California the section assigning the burden of proof to defendant has been read to assign only the burden of producing evidence sufficient to raise a reasonable doubt as to the matters of excuse and justification. *People v. Frye*, 7 Cal. App. 4th 1148, 1154-55 (1992).

69. LAFAVE AND SCOTT, *supra* note 66, § 5.7-5.7(d), at 454-59.

The standard most jurisdictions use to assess the reasonableness of the fear is an objective standard. That is, "the apprehension of danger and belief of necessity . . . must be . . . such as a reasonable man would, under all the circumstances, have entertained. 40 AM. JUR. 2D § 154, at 443. However, several states explicitly provide for a subjective standard. *Id.* at 443. *See also* Elizabeth Schneider and Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149, 155 n.53 (1978), reprinted in WOMEN'S SELF-DEFENSE CASES, THEORY AND PRACTICE 1, 16 (Elizabeth Bochnak ed., 1981) [hereinafter Schneider and Jordan, *Representation*] ("In fact, the standard generally applied is an amalgam of both a subjective and objective test. It includes the individual's perception of both apprehension and imminent danger from the individual's own perspective, but involves an objective view by the jury of these circumstances"). *See also* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 385 (1991) ("In most jurisdictions the standard of reasonableness against which the necessity of a defendant's act is measured explicitly includes consideration of the characteristics and history of the defendant on trial; her acts are measured in the light of her own perceptions and experience"). *See infra* notes 98-113 and accompanying text for discussion of the impact of an artificially objective standard in battered women's homicide trials.

70. LAFAVE AND SCOTT, *supra* note 66, § 5.7(b), at 455.

71. Deadly force is defined by LaFave and Scott as force "which its user uses with the intent to cause death or serious bodily injury to another or which [s]he knows creates a substantial risk of death or serious bodily injury to the other." *Id.*, § 5.7(a), at 455.

72. The duty to retreat varies by jurisdiction. The majority rule is that a person need not retreat when attacked; a person may stand his or her ground and use deadly force to defend against impending danger of death or serious bodily harm. GILLESPIE, *supra* note 30, at 77; Maguigan, *supra* note 69, at 450-51; Elizabeth Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L.

nature, the basic premise of the affirmative defense is that when an individual has "no opportunity to resort to the law for [her] defense, [she may] take reasonable steps to defend [her]self from physical harm."⁷³

B. DIFFICULTIES IN APPLYING THE SELF-DEFENSE CONSTRUCT
TO BATTERED WOMEN WHO KILL

The self-defense construct may fail battered women who kill when the requirements of imminence and necessary force are rigidly applied⁷⁴ and when the standard for judging their actions is artificially objective.⁷⁵ More abstruse rules, such as the duty to retreat or the co-tenant exception to the "castle doctrine,"⁷⁶ may result in convictions in jurisdictions that have adopted those rules.⁷⁷

L. REV. 623, 633 (1980) [hereinafter Schneider, *Equal Rights*] (citing LaFave and Scott and stating that a substantial minority require retreat).

73. LAFAVE AND SCOTT, *supra* note 66, § 5.7(a), at 454.

74. Much has been written on the subject of the inadequacy of the self-defense construct and its application to battered women. Cynthia Gillespie examines the varying requirements of self-defense law and recounts numerous cases in which the law failed women who had defended themselves in remarkably confrontational situations. GILLESPIE, *supra* note 30. Gillespie maintains that three areas of self-defense law operate to ensure convictions of battered women who kill: the definition of imminence, the rule requiring retreat, and the requirement of "sufficiently serious harm" (the equal force or proportionality requirement). *Id.* at 50, 87. *But see* Maguigan, *supra* note 69, surveying over 200 reported appellate court decisions addressing the cases of battered women who killed husbands or lovers, asserted self-defense, and appealed claimed errors by the trial court. Maguigan concludes that most of the women convicted actually acted in confrontational situations, and that substantive criminal law definitions are, or could be, sufficient to allow battered women to prevail on self-defense claims, but that trial judges unfairly applied these definitions, depriving women of fair trials. *Id.* at 385, 405, 432.

Professor Cathryn Rosen has argued that any mistakes regarding the "existence of the triggering condition" (i.e. the unlawful aggression that stimulates a woman's perception that she is about to suffer imminent bodily harm) must negate a justification defense. Cathryn Jo Rosen, *The Excuse of Self-Defense, Correcting A Historical Accident On Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 21 (1986). In addition, she argues that mistakes regarding the proportionality (i.e. the amount of force necessary) or the necessity itself (i.e. the imminence) must also prove fatal to a justification defense. *Id.* Instead, she advocates a return to the common law distinction between justification and excuse and argues that self-defense should be an excuse. *Id.* at 18. When framed as excuse, Rosen argues, the defense could lead to acquittals because it "focuses on the actor's subjective perceptions," and could lead to a conclusion that "due to internal or external pressure, she was not morally blameworthy." *Id.* at 22.

75. Maguigan, *supra* note 69, at 412-13 (the standard used may affect whether a defendant gets a self-defense instruction at all, and it affects the admissibility and scope of "social context" evidence as well as the use of the female gender pronoun in jury instructions); GILLESPIE, *supra* note 30, at 93 ("[J]urors are invited — indeed obligated — to substitute their judgment for hers in a situation that most of them can barely imagine being in and seldom understand").

76. *See infra* notes 139-41 and accompanying text.

77. GILLESPIE, *supra* note 30, at 77-78, 187-88. Gillespie claims that the exception

Until recently, most writers analyzing and criticizing the convictions of battered women who kill argued that the law itself was a male prerogative.⁷⁸ Their claims were easily supportable; our society has condoned the use of force by men in situations in which women have not been afforded the same entitlement.⁷⁹ In the mass of scholarly writing and media reporting that has accompanied the women's self-defense work movement,⁸⁰ nearly all critics of the results in battered women's cases assumed that the same traditional legal construct that had allowed men to defend themselves was simply too narrow to account for the cases of battered women who kill.⁸¹

to the castle doctrine — an exception that requires retreat in one's own home — is most frequently applied in domestic violence cases. *Id.* at 82-83. See *infra* notes 139-147 for discussion of application of retreat rules in California

78. See *id.* at 78-79; Phyllis Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 126 (1985); Schneider and Jordan, *Representation*, *supra* note 69; Elizabeth Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 198 (1986) [hereinafter Schneider, *Describing and Changing*]; WOMEN'S SELF-DEFENSE CASES, *supra* note 69, at 43 (describing the construct as a "male v. male" model). But see Maguigan, *supra* note 69, at 385-86 (suggesting that the construct is flexible enough in all its elements to accommodate the battered woman's experience but that judges unfairly interfere with the woman's right to present the self-defense claim to the jury).

79. Paramour laws (by statute and case law), prevalent in the last century and earlier in this century, permitted a man to kill another man he caught *in flagrante delicto* with his wife, or who had committed a rape upon his daughter. See Schneider and Jordan, *Representation*, *supra* note 69, at 153-54; 40 AM. JUR. 2D § 123, at 415. The modern law is that, absent a statute, there is no recognition of a complete excuse for homicide, and the presence of adultery will only reduce the offense to manslaughter. 40 AM. JUR. 2D § 123, at 415. Three states — Texas, New Mexico, and Utah — still had such laws on their books as late as 1973. Peter Bonventre, Lucy Howard and Sylvester Monroe, *The Right to Kill*, NEWSWEEK, Sept. 1, 1975, at 69.

In addition, men have been able to use deadly force to repel forcible sodomy. Although women have long had a common law right to defend themselves with deadly force in confrontational situations where rape was just about to be committed, the case of Inez Garcia illustrates the attitudes of judges and jurors in attempting to prevent a self-defense claim in a situation that was not immediately confrontational. Inez Garcia was raped by two men. They told her they would return and rape her a second time and knew where she lived. Inez walked into the street with a rifle to search for and confront the men; she found one, and when he made a movement toward her, she shot him. Rosen, *supra* note 74, at 34. At her first trial the judge repeatedly said, in front of the jury, "Rape has nothing to do with this homicide prosecution." Schneider and Jordan, *Representation*, *supra* note 69, at 155. In addition, a juror in her first trial, interviewed after Garcia was convicted at the trial, stated, "You can't kill somebody for trying to give you a good time." *Id.* at 154.

80. Professor Schneider uses the term "women's self-defense work" to describe the movement on behalf of women "to overcome sex-bias in the law of self-defense and to equalize treatment of women in the courts." Schneider, *Describing and Changing*, *supra* note 78, at 197 n.9. The name comes from the Women's Self-Defense Law Project, founded in 1978 by the Center for Constitutional Rights and the National Jury Project. *Id.* at 195 n.3.

81. See Maguigan, *supra* note 69, at 382-83 (asserting that nearly all writers uncrit-

Cynthia Gillespie, drawing upon the historical development of self-defense law, stated:

It cannot be emphasized too strongly that [in England at common law when the defense of self-defense began to take root] all of these judges were male, as were the jurors and most of the criminal defendants brought before them. Their cases involved the sorts of situations men were apt to get themselves into; and the excuses or defenses they offered were those that made sense . . . in terms of acceptable or understandable masculine behavior.⁸²

Gillespie notes that the law of self-defense, from the rough environment of medieval England to the rugged American frontier, was intended to apply either to the sudden violent attack, as in a robbery on a rural road,⁸³ or to a barroom brawl, where two willing participants slug it out with mutual consent.⁸⁴ In contrast, battered women are recipients of unilateral physical assaults,⁸⁵ often stretched over hours and days and continued at random for years or even decades. Gillespie astounds the reader with stories of numerous self-defensive actions taken by battered women, mostly during such unilateral assaults, for which they were convicted of murder.⁸⁶

She argues that both women and men must have the right to take a life in order to save their own lives.⁸⁷ However, she argues against a separate law for men and women and states that we do not need laws for battered women separate from everyone else.⁸⁸ She instead calls for eas-

ically accepted two basic and incorrect assumptions: that battered women who kill do so in nonconfrontational situations and that existing self-defense law is too narrow to result in acquittals).

82. GILLESPIE, *supra* note 30, at 35.

83. *Id.* at 39 ("It was this medieval world of castles and swordplay, highwaymen and rough and ready peasants with daggers in their belts that was reflected in the common law of self-defense that the English colonists brought with them to America").

84.

Where two men . . . [or two women] mutually enter a physical fight, there are many ways for one to signal to the other that he, or she, wants to de-escalate the proceedings. He can back away, smile, make conciliatory gestures, say he doesn't want to fight, offer to buy his adversary a drink and talk . . . , apologize . . . or concede.

Id. at 78-79. See also David L. Faigman, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 U. VA. L. REV. 619, 621 (1986) ("Typically, the term 'self-defense' conjures up images of a defender who, backed against a wall and facing imminent death, strikes out at the last moment to kill the attacker").

85. GILLESPIE, *supra* note 30, at 78.

86. *Id.* at 1-30.

87. *Id.* at 50, 182.

88. *Id.* at 182.

ing the definition of imminence and incorporating a subjective element into the standard against which a person's actions are measured when she acts in self-defense.⁸⁹ Gillespie also urges abandonment of the requirement of equal force and the exception to the "castle doctrine."⁹⁰

Professor Holly Maguigan directly challenges whether the substantive law of self-defense is inadequate to render just results in the trials of battered women who kill.⁹¹ She concludes that there are indeed elements at trial that prevent a woman from "getting to the jury"⁹² and that otherwise operate to account for the seemingly unjust results⁹³ in trials where women who defended themselves in confrontational situations were nevertheless convicted. However, Maguigan finds fault not with the self-defense construct but with trial and appellate court judges who apply it unfairly.⁹⁴ She also criticizes the lack of procedural (rather than substantive or evidentiary) rules, which may deprive women of the opportunity to assert self-defense at all.⁹⁵ Lastly, she exposes the patently incorrect assumption that most battered women who kill do so in

89. *Id.* at 185-90. Professor Maguigan argues, based upon her empirical study, that each of these suggestions is already the "majority rule" in American jurisdictions. Maguigan, *supra* note 69, at 385-86. Accepting that they are, Gillespie has still illustrated the need for change in the minority of jurisdictions that adhere to the stricter interpretations of these substantive law definitions.

90. See *infra* notes 134-47 and accompanying text.

91. Maguigan, *supra* note 69.

92. Maguigan defines "fair trial" as "getting to the jury," which includes:

(1) the content of the instruction on substantive criminal law definitions of the elements of self-defense, (2) the admissibility of evidence about the context of the defendant's act and the instructions to the jury on the relevance of the evidence, and (3) the procedural rules defining the quantity and quality of evidence a defendant must produce to be entitled to a self-defense instruction.

Id. at 406.

93. Maguigan enumerates several such elements, including

[T]he interplay of sex, race, and class bias in the courtroom, prevailing attitudes about family violence in the community from which the pool of potential jurors is drawn, the quality of the lawyering on each side, and the resources available in the form of money, expert witnesses, trial consultants, and investigators.

Id. at 406 n.93.

94. *Id.* at 432-37.

95. Maguigan states that the rules outlining when a woman is entitled to a self-defense instruction are "the single most important determinant of a defendant's ability to get an instruction on self-defense." *Id.* at 439. She states that judges have enormous power to make outcome-determinative decisions in cases involving battered women defendants; this power includes the ability to decide whether to allow the jury even to consider whether a woman acted in self-defense. *Id.* In addition, she maintains that appellate courts are unlikely to reverse decisions made by trial judges in jurisdictions where the trial judge is allowed to make credibility determinations regarding the threshold evidence brought forward by the defendant. *Id.* at 441.

"nonconfrontational" situations (*i.e.* sleeping man, or "burning bed" killings, contract killings, and killings in which a woman was the aggressor after a definite lull in the violence).⁹⁶

Maguigan tests the claims that the objective standard, the definitions of imminence and proportionality, and the rules of retreat work to deprive battered women of fair trials. Instead, she finds that the majority of jurisdictions employ flexible definitions that should allow battered women to present their claims successfully.⁹⁷ The following analysis of California case law considers these claims.

C. SUBSTANTIVE LAW DEFINITIONS AND THEIR IMPACT IN CALIFORNIA ON THE TRIALS OF BATTERED WOMEN WHO KILL

1. *The Objective Standard and Its Application to Battered Women Who Kill*

Because the law of self-defense imposes the requirement that a killing in defense of self be reasonable, a jurisdiction must apply some standard against which to measure the claim. Maguigan argues that the standard applied by the majority of jurisdictions to assess reasonableness is often a test combining objective and subjective features.⁹⁸ She argues that this is so even in jurisdictions that claim they use an "objective" standard.⁹⁹

The highest courts of New York and Washington clearly stated their objective tests in two of the most famous cases allowing the jury to consider circumstances peculiar to the defendants.¹⁰⁰ The New York court

96. *Id.* at 388-401.

97. *Id.* at 385-86

98. *Id.* at 409-12.

99. *Id.* at 409-10.

100. The cases were those of Bernard Goetz, the New York "subway vigilante," *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986), and Yvonne Wanrow, a defendant in an early, successful women's self-defense case, *State v. Wanrow*, 559 P.2d 548 (Wash. 1977) (en banc).

The *Goetz* jury was instructed with New York's two-part "objective" test, stated by Maguigan as follows:

[F]irst, the jury must decide whether the defendant actually and honestly believed in the necessity of using deadly defensive force; second, the jury must decide whether a reasonable person in the defendant's circumstances, including his or her history with the decedent and his or her perceptions, would so believe. This test is not appreciably different from a test characterized as "subjective" by the Supreme Court of Washington in *State v. Wanrow*.

Maguigan, *supra* note 69, at 409-410 (citations and footnotes omitted).

The "subjective" test in *State v. Wanrow*, 559 P.2d 548 (1977), was formulated as follows:

[T]he justification of self-defense is to be evaluated in light of all the facts and circumstances known to the defendant, including those

in the trial of Bernard Goetz allowed the jury to consider "the circumstances facing the defendant," including "any prior experiences he had."¹⁰¹ The jurors were able to consider prior experiences Goetz had had with others, not just with the men he shot, in determining whether the defendant's conduct conformed to the "hypothetical reasonable person."¹⁰² Even though such a standard allows the jury to consider the facts and circumstances within the general experience of the defendant, the jury is still asked to determine objectively if the action, given those facts and circumstances, was reasonable. This finding requires more than that the defendant actually and honestly believed in the necessity of using self-defense, which is the "subjective" prong of New York's standard.

The Washington Supreme Court in *State v. Wanrow*¹⁰³ stated clearly that its test was "subjective," and it took pains to state that the objective test "applicable to an altercation between two men" is inapplicable to women.¹⁰⁴ It stated that, "All of [the] facts and circumstances should have been placed before the jury, to the end that they could put themselves in the place of the [defendant] In no other way could the jury safely say what a reasonably prudent man similarly situated would have done."¹⁰⁵ However, such a test is still objective, because it requires the jury to find more than that the defendant actually perceived danger of imminent harm. The jury must still decide if a reasonably prudent "man" would have so acted, but it may consider the more subjective elements of the defendant's knowledge and experience.

The *Goetz* and *Wanrow* courts applied settled law to the cases before them,¹⁰⁶ cases whose facts required considering individual circumstances

known substantially before the killing

. . .

All of these facts and circumstances should have been placed before the jury, to the end that they could put themselves in the place of the [defendant], get the point of view which he had at the time of the tragedy, and view the conduct of the [deceased] with all its pertinent sidelights as the [defendant] was warranted in viewing it.

Id. at 555-56.

The court also held that the jury must consider the circumstances known to the defendant in order to "mak[e] the critical determination of the degree of force . . . a reasonable person in the same situation . . . seeing what [s]he sees and knowing what [s]he knows, then would believe to be necessary." *Id.* at 557 (citations omitted).

101. See Maguigan, *supra* note 69, at 410 (emphasis added) (quoting the record from the trial of Bernard Goetz).

102. *Id.*

103. *State v. Wanrow*, 559 P.2d 548 (Wash. 1977) (en banc).

104. *Id.* at 558.

105. *Id.* at 556.

106. See *id.* at 555 ("[T]he jury . . . was directed to consider only those acts and circumstances occurring 'at or immediately before the killing . . . ' This is not now, and never has been, the law of self-defense in Washington"); *Goetz*, 497 N.E.2d, at

in order to determine accurately, and therefore fairly, how the "hypothetical reasonable person" would have acted. Such tests are neither subjective, nor are they the absolutely objective, traditional reasonable man test. Maguigan argues that such hybrid tests are employed in the majority of jurisdictions.¹⁰⁷ In order to assess fairly whether a battered woman's act of killing was reasonable a jury can — and should be permitted to — judge her action "objectively," while still taking into account the full set of circumstances known to her, including the history of abuse.¹⁰⁸

In California, "perfect self-defense requires both subjective honesty and objective reasonableness and completely exonerates the accused. Imperfect self-defense requires only subjective honesty and negates malice aforethought, reducing the homicide to voluntary manslaughter."¹⁰⁹ The objectively reasonable prong requires considering whether a "reasonable person *in the same circumstances* would have had the same perception and done the same."¹¹⁰ Despite the words "in the same circumstances," California's test has been read narrowly. The defendant in *People v. Aris* is one of the California petitioners. Her case, along with that of Valoree Day,¹¹¹ confirms that California's objective test is not like those of New York and Washington and does not take the full set of circumstances known to the defendant into account when determining if her fear of imminent harm is reasonable. Instead, only the circumstances as they appeared to the reasonable person, or to the court, will be considered.

The *Day* court cited *Aris* with approval for the proposition that battered woman syndrome is not relevant to show objective reasonableness.¹¹² However, in two separate parts of the discussion following that holding the court stated that battered woman syndrome was necessary to allow the jury to *objectively analyze* a battered woman's claim of self-de-

52 ("[An argument that an objective element precludes a jury from considering prior experiences] falsely presupposes that an objective standard means that the background and other relevant characteristics of a particular actor must be ignored. To the contrary, we have frequently noted that a determination of reasonableness must be based on the 'circumstances' facing a defendant or his 'situation.'" (citations omitted)).

107. Maguigan, *supra* note 69, at 409.

108. Rosen maintains that "[the] theory of individualization, as applied by feminists to self-defense, is nothing more than a subjective standard of reasonableness." Rosen, *supra* note 74, at 32 n.121. She says the subjective test is one that asks, "Would a reasonable person in defendant's circumstances have believed the [threatened] force was . . . necessary and immediate?" *Id.* This is the same test that New York and California call objective, although each applies it differently.

109. *People v. Aris*, 215 Cal. App. 3d 1178, 1186 (1989).

110. *Id.* (emphasis added). See also 20 CAL. JUR. 2D, *Criminal Law* § 302, at 455 (1985) [hereinafter 20 CAL. JUR. 2D] (the conduct of the deceased must have been such as would be likely to produce a fear of death or serious bodily injury in a reasonable person under the same or similar circumstances).

111. *People v. Day*, 2 Cal. App. 4th 405 (1992).

112. *Id.* at 414.

fense when deciding upon issues other than whether her fear was reasonable.¹¹³ It is not a far step to instruct a jury that it may consider battered woman syndrome evidence (or evidence of a history of battering) when deciding whether a woman had a reasonable fear of imminent harm. Indeed, such an instruction would be mandated by logic and common sense.

2. *Does Imminent Mean Imminent, or Does it Mean Immediate?*

Maguigan also found that the definition of "imminence" used by the majority of jurisdictions permits the jury to consider all the circumstances, including past events, surrounding the defendant's action.¹¹⁴ This broader definition allows the jury to make a fairer appraisal of the context of the woman's action. The other definition of imminence, correctly recognized as an immediacy rather than an imminence requirement,¹¹⁵ restricts the jury's focus on the defendant's act to "the particular instant of the defendant's action."¹¹⁶

The choice of definition makes a powerful difference, as illustrated by the case of California petitioner, Brenda Aris.¹¹⁷ The jury deliberated about whether Aris was in imminent danger. One juror, Cheryl McGlocklin, felt that "imminent" meant "something you feared, such as when the weatherman says a tornado is sighted It doesn't mean the tornado is going to hit where you are, but the newscast says you're in imminent danger."¹¹⁸ The judge disagreed. When the jury asked for

113. *Id.* at 416 (it would have "assisted the jury in objectively analyzing Appellant's claim of self-defense by dispelling many commonly held misconceptions about battered women [that] a prosecutor may exploit in arguing to the jury"), 419 ("Frequently, conduct appears unreasonable to those who have not been exposed to the same circumstances. Fortunately, most people are not . . . abused. It is only natural that people might speculate as to how they would react and yet be totally wrong about how most people in fact react").

114. Maguigan, *supra* note 69, at 449.

115. Maguigan states that the various state courts are not consistent in their definitions of imminence and immediacy. Maguigan, *supra* note 69, at 414 n.119. Some states, such as California, use the word "imminent," when in fact the test focuses on immediacy.

Gillespie suggests changing the self-defense construct to allow a more flexible interpretation of imminence that includes "eas[ing] a bit . . . [the] present interpretation by most courts as meaning 'immediate.'" GILLESPIE, *supra* note 30, at 185. She suggests that judges could easily define the term for juries in a way "that distinguishes it from 'immediate' and allows a broader time frame than the usual strict definition." *Id.* at 187. The Oxford English Dictionary defines "imminent" as "[i]mpending threateningly, hanging over one's head; ready to befall or overtake one; close at hand in its incidence; coming on shortly." OXFORD ENGLISH DICTIONARY 685 (2d ed. 1989).

116. Maguigan, *supra* note 69, at 414.

117. *People v. Aris*, 215 Cal. App. 3d 1178, 1184-85 (1989). See *supra* notes 38-40 and accompanying text.

118. Cooper, *Juror Tainted*, *supra* note 54.

clarification of the term, it became clear to the judge that several of the jurors had consulted dictionaries to discern the meaning of the word "imminent." According to McGlocklin, the judge glared at her and asked her, "Did you look up the word imminent in the dictionary? Didn't I instruct you not to do any research on your own?"¹¹⁹ She said she saw the judge "run down the main hall and return with a Webster [sic] dictionary."¹²⁰ The judge then polled the jurors individually, and McGlocklin promised to abide by the judge's instruction. He instructed the jury on the legal meaning of the term, according to McGlocklin, as "immediately, staring you in the face, without a doubt it's going to happen right now."¹²¹ She felt that "once he gave us his definition it was no longer a jury case; he decided the case."¹²² Aris was convicted of second-degree murder. McGlocklin, one other juror, and defense counsel were all in tears when the verdict was read, and a male juror was slumped down in his seat with his hand over his face. Other jurors who had had doubts gave in once McGlocklin did.¹²³

The appellate court stated that its decision on Aris's claim of error regarding the trial court's instruction on imminence "also affects our ruling on the trial court's refusal to instruct on perfect self-defense and the harmlessness of the exclusion of the expert testimony."¹²⁴ The issue was therefore extremely important (and the denial fatal) to the defendant's ability to receive instructions on "perfect" self-defense, the only justification resulting in complete acquittal. The defendant was entitled only to prove "imperfect" self-defense, that she acted with an honest but unreasonable belief in the need for self-defense. However, the judge's instruction imposed the strict imminence definition upon that defense as well. Once the jury determined that Aris did not act in fear of "immediate" harm, they convicted her of second-degree murder.

In its opinion, the appellate court stated that it agreed with "the judge's scholarly review of the leading cases,"¹²⁵ and went on to discuss "the immediacy of the imminence requirement in California."¹²⁶ It

119. *Id.*

120. *Id.*

121. *Id.* The instruction given was:

Imminent peril . . . means that the peril must have existed or appeared to the defendant to have existed at the very time the fatal shot was fired. . . . [T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with.

People v. Aris, 215 Cal. App. 3d 1178, 1187 (1989).

122. Cooper, *Juror Tainted*, *supra* note 54.

123. *Id.*

124. *Aris*, 215 Cal. App. 3d, at 1186.

125. *Id.* at 1187.

126. *Id.* at 1188.

cited two cases from the late 1800s and a case from the earlier part of this century that spoke of the right to self-defense in the very manly situations that self-defense law was developed to address.¹²⁷ The court went on to say that this definition of imminence reflects "the great value our society places on human life." The court analogized Aris's action to imposing the death penalty on the abuser¹²⁸ and stated that the law would "not even partially excuse [her action] unless more than merely threats and a history of past assaults [were] involved."¹²⁹

The trial and appellate courts relied on California precedent drafting and approving of the instruction on imminence. Yet the definition of imminence is nothing more than a judge-made rule of common law¹³⁰ reflecting a policy determination regarding the right of self-defense.¹³¹ The appellate court interpreted the requirements of self-defense as rules to ensure the protection of the life of the batterer (in Aris's case a man who had beat her continuously and severely for over ten years).¹³² The court

127. The court cited *People v. Scoggins*, 37 Cal. 676, 683-84 (1869):

A person whose life has been threatened by another . . . may reasonable infer, when a hostile meeting occurs, that his adversary intends to carry his threats into execution The philosophy of the law on this point is sufficiently plain. A previous threat alone, and unaccompanied by any immediate demonstration of force at the time of the rencounter [sic], will not justify or excuse an assault, because it may be that the party making the threat has relented or abandoned his purpose, or his courage may have failed, or the threat may have been only idle gasconde, [sic] made without any purpose to execute it.

Aris, 215 Cal. App. 3d, at 1187-88.

128.

The criminal law would not sentence to death a person such as the victim in this case for a murder he merely threatened to commit . . . it follows that the criminal law will not even partially excuse a potential victim's slaying of [him] unless more than merely threats and a history of past abuse is involved.

Aris, 215 Cal. App. 3d, at 1188.

129. *Id.*

130. See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1987) (comparing a judge's latitude to make policy considerations in interpreting common law rules with his or her strict duty to dispatch legislative intent in interpreting statutes).

Posner argues that common law is a collection of concepts, such as negligence, good faith, etc., that serve as major premises, with the facts of the case supplying the minor premises. *Id.* at 182. He states, "Obviously, the choice of premises is critical, and that is where public policy comes in." *Id.* He argues that treating major premises (i.e. rules of common law) as "self-evident" has led to inefficient decisions by legal formalists who were "uncritical of [their] premises." *Id.* at 182-84.

131. See *id.* at 182 ("The reason [to apply common law principles] has to be traceable to some notion of policy rather than just be the result of arbitrary personal preferences . . . or some other thoroughly discredited ground of judicial action").

132. *Aris*, 215 Cal. App. 3d, at 1189 ("[B]atterers of women, even though they deserve punishment for their acts of battery, nevertheless are entitled to the same pro-

wrote that the defendant should not be excused when she could have moved out of the state to live with her aunt or left her abusive husband and refused to take him back.¹³³ Aris had repeatedly left her husband and returned to him for a variety of reasons, some involving threats against the lives of herself and her family. The court should have recognized that the policy behind self-defense is also to protect the life of the person who has a reasonable fear of death or serious bodily injury. It may then have been more willing to consider that the California immediacy requirement may be inadequate to render justice in cases where a battered woman, because of the history of abuse, reasonably perceives violence that is not immediate but is nonetheless imminent.

3. *The Rule of Equal Force in California*

Maguigan maintains that the rule of "equal," "like," or "proportional" force does not exist.¹³⁴ Instead, she argues that the overwhelming majority of jurisdictions do not prohibit resort to a weapon against an unarmed aggressor. The majority rule — for male and female defendants — is that the force must be reasonably necessary to repel the threatened danger.¹³⁵ In California, the rule is reasonable force, defined as "only so much force as is necessary to repel the attacker"¹³⁶ and the amount of force a "reasonable person would employ under similar circumstances."¹³⁷

4. *The Duty to Retreat and Exceptions to the Castle Doctrine*

In some jurisdictions the victim of an actual or imminent attack must retreat to a position of safety, if possible. If the attack continues after

tection of their lives by the law that is afforded to everyone else The law cannot allow her to shoot her husband instead of, as was the case here, inconveniencing her out-of-state aunt by moving in with her or leaving her husband and firmly refusing to take him back").

133. *Id.*

134. Maguigan, *supra* note 69, at 417-19 (the "overwhelming majority of jurisdictions . . . does not prohibit resort to a weapon against an unarmed aggressor"). Gillespie recounts several disturbing cases in which the rule of equal force was apparently applied to convict women who fought back using weapons against unarmed assailants. GILLESPIE, *supra* note 30, at 51-67. *See also id.* at 185 (Gillespie suggests abandoning the equal force rule yet notes that it is "already on its way out"). *See also supra* note 74, discussing, *inter alia*, the perception that the rule of proportional force presents difficulties in applying the traditional construct to battered women's cases.

135. Maguigan, *supra* note 69, at 418-19. Maguigan stated that the proportional force rule was an issue on appeal in "only" ten percent of the cases analyzed in her study, and half of those were affirmed because "courts found that excessive force was manifested by the woman's continued use of the weapon once the decedent was disabled." *Id.* at 419.

136. 20 CAL. JUR. 2D § 306, at 459.

137. *Id.*

such a retreat, the victim may employ deadly force in self-defense. The majority of American jurisdictions do not impose upon a victim a duty to retreat before employing deadly force in self-defense.¹³⁸ Even in those jurisdictions that do impose a duty of retreat, the "castle doctrine" relieves a person of that duty when he or she is attacked in his or her own home.¹³⁹ Gillespie notes, however, that in the single instance in which women most need to defend themselves (in the home against an abusive mate), courts in some jurisdictions have fashioned an exception to the castle doctrine. These courts hold that a woman must retreat when attacked in her own home by a co-tenant.¹⁴⁰ In addition, some courts have held that there is also a duty to retreat even if the person is not a tenant but has been invited or has implied permission to come and go.¹⁴¹

Maguigan reports that in retreat jurisdictions most courts apply the castle doctrine to eliminate the duty to retreat when defendants are attacked in their own homes. She states that *some* retreat jurisdictions do not apply the castle doctrine when the attack was by a cohabitant, but that the duty to retreat arose in "only a minority" (twelve percent) of battered women's cases on appeal.¹⁴² It is debatable whether more than ten percent of battered women's cases (that reach trial and appeal) is a "minority" worth discarding. If estimates are correct on the number of battered women who kill in self-defense each year, even twelve percent is an appreciable number. Legislatures should remove this "absurd and totally irrelevant question of who had a right to be on the premises" and instead consider whether a woman "was in fact trying to defend herself."¹⁴³

However, in California a person need not ever retreat when attacked with deadly force. She may not only stand her ground,¹⁴⁴ she may even, when necessary to secure life or freedom from great bodily injury, pursue the attacker.¹⁴⁵ From that follows the rule that a person is never under a duty to retreat out of her house to avoid violence, even when a retreat might safely be made.¹⁴⁶

It is important to note that Maguigan's empirical research identified the flexibility of the substantive law definitions in the majority of jurisdictions, not all. Such flexibility fails to help women who happen to defend themselves in a jurisdiction that lacks one or several of the more ac-

138. See *supra* note 72.

139. GILLESPIE, *supra* note 30, at 82, 187-88.

140. *Id.* at 83-84, 187-88.

141. *Id.* at 84-85.

142. Maguigan, *supra* note 69, at 386, 419-20.

143. GILLESPIE, *supra* note 30, at 87.

144. 20 CAL. JUR. 2D § 310, at 454.

145. *Id.* § 312, at 466-67.

146. *Id.* § 311, at 466.

commodating definitions. This is evident from the California *Day* and *Aris* cases, where the strict objective test and the strict definition of imminence both operated to ensure conviction.¹⁴⁷ Maguigan notes that states with combinations of a strict objectivity test and an immediacy requirement, such as California's, also have the highest threshold requirements that battered women defendants must meet in introducing social context evidence of battering at all, which she notes operates as directly as substantive law definitions and instructions in preventing battered women from receiving a fair trial.¹⁴⁸ Valoree Day defended herself in a situation that was not only confrontational but was truly terrifying.¹⁴⁹ In Brenda Aris's case, several members of the jury would have acquitted her, or at least would have found on a lesser charge, with a true definition of imminence, rather than immediacy.¹⁵⁰ Until all jurisdictions recognize that the more flexible definitions are within the law, and until the courts or legislatures in every jurisdiction mandate application of the "majority" rules, battered women will continue to be convicted at unfair trials, reaffirming the traditional self-defense construct as "a law for men."¹⁵¹ In many cases in which women fight back in extremely confrontational situations, juries will continue to convict women of murder or manslaughter. Because of the trial judge's discretion and misapplication of the legal construct, battered women will continue to undergo unfair trials. Lastly, there are factors unrelated to substantive criminal law definitions that prejudice the trials of battered women who kill.¹⁵² It is beyond the ability of legislators and judges to correct these biases, even if they define the law more fairly. For all these reasons, executive clemency continues to be a forum of last resort — a necessary forum in which a battered woman can still argue the merits of her defensive action.

D. SOCIAL AND POLITICAL FACTORS AND THEIR IMPACT IN CALIFORNIA ON THE TRIALS OF BATTERED WOMEN WHO KILL

A district attorney has discretion to decide whether, and at what level, to charge a woman who has killed her alleged batterer; a district attorney can decline to bring any charges when the killing is justified. The fact that a killing has occurred does not make the act a murder. Since murder

147. See *supra* notes 109-13, 117-33 and accompanying text.

148. Maguigan, *supra* note 69, at 415 n.123.

149. See *People v. Day*, 2 Cal. App. 4th 405 (1992).

150. See *supra* notes 118-23 and accompanying text.

151. See GILLESPIE, *supra* note 30, at 31-49 (surveying the development of the defense of self-defense and concluding that the American law of self-defense adopted from England retained the "sudden attack" and "fight between equals" rationales that appear to serve men well).

152. See *supra* note 93.

is defined as killing with malice aforethought,¹⁵³ the decision to prosecute a woman for murder is both a discretionary evaluation and a preliminary legal conclusion that she acted with that intent.

District attorneys may base their decisions on an unreasonable fear that deciding not to prosecute will lead to an unprecedented rash of husband-killing. For instance, prosecutors assailed the granting of clemencies in Ohio and Maryland as bestowing a "license to kill."¹⁵⁴ Dennis Watkins, Trumbull County prosecutor and president of the Ohio Prosecuting Attorneys' Association, feared that, "Now, instead of going to the courts or getting a divorce, these women will think, 'Maybe I'll kill him.' Taking a human life is not something we want to promote."¹⁵⁵

Prosecutors are presented with the same difficulties that the male self-defense construct poses for others. They distrust a woman's assertion of self-defense when they believe her fear of death or bodily harm is not sufficiently imminent. "Sleeping man" cases are especially subject to such skepticism. Michael Sweet, executive director of the 2,500-member California District Attorneys Association, has said, "If she kills him in his sleep, did this woman really have reason to fear for her life at that moment? If she's so convinced he's going to kill her, why doesn't she leave?"¹⁵⁶ Ohio prosecutor Watkins stated, "When the victim is killed while he is sleeping, battering is not a proper self-defense claim. Our concern is that in the future we're going to get a lot of women claiming to be battered. In our view, it is not a proper defense to murder."¹⁵⁷

As a result, prosecutors are likely to bring charges even when they believe the equities favor a reduced sentence. Suffolk County, New York, district attorney James M. Catterson, Jr., stated, "When you have a life taken, there has to be some punishment. But it may be punishment with sensitivity and understanding."¹⁵⁸ Even such a well-intentioned view ignores the fact that when a life has been taken in self-defense, punishment should *not* be meted out, even punishment "with sensitivity and understanding."

People react to the cases in which the batterer is sleeping with such categorical statements. Although it may still be reasonable for a battered

153. See CAL. PENAL CODE § 187(a) (West 1988).

154. See, e.g., Wilkerson, *Clemency Granted to 25*, supra note 9 (quoting Dennis Watkins, president of the Ohio Prosecuting Attorneys Association).

155. *Id.*

156. Boubion, supra note 16. An Alameda County district attorney believes it was proper to prosecute Harriette Davis, a battered woman, because he believed she was not in "imminent danger at the time of the shooting." Barbieri, *Push for Clemency*, supra note 15.

157. *Id.*

158. Michael Slackman, *Guilty of Killing, She Got Lenience; 1st LI Case Allowing "Battered" Syndrome*, NEWSDAY, Dec. 12, 1991, at 3.

women to kill a batterer when he is sleeping, depending upon the circumstances as they appear to her, most women who kill batterers do not kill them while they are sleeping.¹⁵⁹ The tendency to generalize with such statements evinces a bias against self-defense in situations in which women kill abusive husbands.

In addition, some district attorneys will manipulate social stereotypes and myths in order to get a conviction. To understand how easy it is to win convictions in these cases, one only need read the facts of several cases and see the resulting verdicts of first- and second-degree murder. One prosecutor, during the trial of a seventy-two-year-old battered woman (one of the California petitioners, now seventy-seven), portrayed the woman as the abuser. She had been abused severely for more than five decades. Because of her tough and abrasive demeanor, and the fact that her anger was palpable during testimony, the jury did not believe she would have accepted more than fifty years of abuse. In that case, the prosecutor turned the myth that all battered women are docile to his advantage.¹⁶⁰ She was convicted of second-degree murder for stabbing her husband. She stated that he appeared to be going for a gun kept under the bed, which she had just knocked out of his hand.¹⁶¹ He had threatened to kill her, and she stabbed him during a confrontation — that is, during a battering incident. She had repeatedly left her husband over the course of five decades of marriage, returning out of fear, love, and because she was a devout Catholic who did not believe in divorce.¹⁶²

Prosecutors may also try to discredit histories of abuse that come in during trial. Despite the fact that police found one of the California petitioners bruised, scratched, and with her false teeth missing, Michael Przytulski, a San Diego prosecutor, tried to establish at trial that her bruises came from a car accident, that she removed her teeth herself, and that the fresh scratches on her back "could have been self-inflicted."¹⁶³ One prosecutor, in a case in which there was a history of abuse and four court orders enjoining a husband from confronting his wife, argued that the killing was premeditated because four months before the killing the woman had bought the gun with which she defended herself.¹⁶⁴

Jurors and courts are also susceptible to arguments that blame the woman.¹⁶⁵ In the *Day*¹⁶⁶ case the prosecutor tried to portray the de-

159. See *supra* note 96 and accompanying text.

160. Cooper, *Legal System Defeats State's Battered Victims*, *supra* note 54.

161. *Id.*

162. *Id.*

163. See Paterno, *Legacy of Violence*, *supra* note 23.

164. Laura A. Kiernan, *Battered Women Use Their Fear as a Defense*, BOSTON GLOBE, Oct. 16, 1988, at N1.

165. See *infra* notes 198-200 and accompanying text.

166. *People v. Day*, 2 Cal. App. 4th 405 (1992).

fendant as the aggressor, stating that "it's Valoree and Steve in the ring again."¹⁶⁷ He also argued that, "[i]f it had been that bad, if she was really the innocent victim, if she didn't want any part of this, if it wasn't mutual, she could have easily left."¹⁶⁸

Prosecutors may also decide to bring charges when cases are "winnable."¹⁶⁹ Whether a case based largely on circumstantial evidence is winnable depends on whether a prosecutor can make the kinds of arguments described in the two California petitioners' cases and in the *Day* case. Since many of the killings occur when only the batterer and defendant are present, at home, and at night,¹⁷⁰ witnesses are rare; thus, many cases are entirely circumstantial. Yet prosecutors charge many women who kill batterers with first- or second-degree murder, the stiffest charges, suggesting a confidence that they can win a conviction.¹⁷¹ Such prosecutorial zeal — ostensibly on behalf of "the people" — suggests that it is necessary to educate prosecutors on domestic violence issues or to encourage some kind of scrutiny over charges filed against battered women.

Advocates for battered women are wary, though, of alienating district attorneys. In other contexts they seek to form an alliance, such as in urging the prosecution of men who batter women and the vigorous enforcement of men who violate restraining orders. California prosecutor Sweet admits that prosecutors embrace some aspects of battered woman syndrome when prosecuting a batterer but challenge the syndrome when it aids a woman defendant.¹⁷² In addition, as battered women's support groups become more active and society becomes more responsive to the widespread problem of violence against women, the hope is that battered women and batterers will get the protection and help they need.¹⁷³ With the proper kind of information, the case histories of horrific beatings we see today will be avoided or stopped in their inception. Finally, a number of plea bargains offered to battered women who kill may be motivated by a desire to not prosecute at higher levels. Many such plea offers are

167. *Id.* at 416.

168. *Id.*

169. See GILLESPIE, *supra* note 30, at 19, 205.

170. *Id.* at 79-80, 213.

171. See *id.* at 205 (quoting Dr. Lenore Walker in stating that in all but one of the ninety-six cases in which she had testified, the defendant was charged with first degree murder). See also ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 11 (1987) (according to FBI statistics, women are more likely to be charged with first- or second-degree murder for killing men than are men who kill women).

172. Boubion, *supra* note 16.

173. See Sheryl Y. McCarthy, *Domestic Violence: A Common Tragedy*, MOUNT HOLYOKE ALUMNAE Q., Winter 1991, at 7 (reporting that increased public awareness has resulted in more progressive state laws to protect women and reporting the one-million-dollar judgment that Sandra Firth, an Idaho woman, received against her batterer of ten years).

accepted.¹⁷⁴

Beyond the attitudes of prosecutors, which reflect both political and social undercurrents influencing battered women's cases, the jurors at a trial also have social biases. A potent social force exerted on the trial process is denial — by the judge, jurors, and prosecutors. The denial may be individual, as when battered women in the trial process do not identify with the defendant, or it may be a cultural denial of the level of violence against women in our society.¹⁷⁵ Traditional notions of appropriate role behavior and the complacent acceptance of violence against women can influence how the jury and judge view the incidents that are admitted at trial.¹⁷⁶

Probably the most disturbing social phenomenon is the lack of protection and support that battered women have received.¹⁷⁷ The irony of this abandonment is highlighted when the jury asks the question, legally irrelevant to a self-defense claim in California, "Why didn't she leave?" One notable example of the older attitude of police handling of domestic violence incidents involves the case of Roxanne Gay, widow of Philadelphia Eagles defensive lineman Blanda Gay. She stabbed him to death in December of 1976, after a long history of abuse. Reports show she called police on several occasions, but police merely asked her husband to walk around the block to cool off — and on one occasion ended up talking about football with him.¹⁷⁸

174. Many women charged with killing abusive partners choose to plead guilty to a lesser charge, either because of naivete or the desire to get the process over with as soon as possible, or the battered woman's state of mind at the time. HLS MANUAL, *supra* note 43, at 149 (citing a study of battered women incarcerated at the Ohio Reformatory for Women, and BROWNE, *supra* note 171, at 163). A vast majority of women (seventy-two to eighty percent) are either convicted at trial or plea-bargain. *Clemency for Battered Women*, DOUBLE-TIME, *supra* note 9, at 1. Accord Jane O. Hansen, *System Often Rebuffs Women*, ATLANTA CONST., Apr. 26, 1992, at A1 (citing Georgia Commission on Gender Bias in the Judicial System study, prepared for Georgia Supreme Court, which found that although women rarely strike back against abusers, when they do kill their batterers eighty percent are convicted of or plea bargain to charges of murder or manslaughter).

175. See Martha Mahoney, *Legal Images of Battered Women: Redefining The Issue Of Separation*, 90 MICH. L. REV. 1, 10-19 (1991).

176. See Susan E. Eisenberg and Patricia L. Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RTS. L. REP. 138, 138 (1977) [hereinafter Eisenberg and Micklow, *Catch-22*] ("[a] serious acknowledgement that wife-beating exists challenges the institution of marriage and intrudes on societal notions of privacy").

177. See generally, DEL MARTIN, *BATTERED WIVES* (1976); Eisenberg and Micklow, *Catch-22*, *supra* note 176 (providing full historical review of the right to punish a wife and surveying the modern reluctance of society to protect battered women and to recognize the widespread problem of wife abuse); Schneider and Jordan, *Representation*, *supra* note 69, at 151.

178. Jerrold K. Footlick and Elaine Sciolino, *Wives Who Batter Back*, NEWSWEEK, Jan. 30, 1978, at 54; Myra Macpherson and Jane Freundel, *Wives Accused in Slaying*

A study sponsored by the Justice Department's National Institute of Justice, conducted in Minneapolis in 1981-82, was the nation's "first controlled experiment in the use of arrest [to alleviate domestic violence disputes]." The study found that violence is twice as likely to recur in households where police try to mediate a dispute than where a suspected attacker is arrested.¹⁷⁹ Then-police chief Anthony Bouza of Minneapolis attributed traditional reluctance to arrest batterers to the absence of legislation that would allow officers to make misdemeanor arrests without having witnessed the event.¹⁸⁰ Other studies have also confirmed that arresting a batterer following an abusive act dramatically reduces the frequency of abuse.¹⁸¹ In addition, since police have started enforcing tougher policies on domestic violence and since shelters and other refuges have been available, the rate of women killing their partners may be decreasing.¹⁸²

Until society responds adequately to the desperate situations of battered women, the killing of women by battering husbands will continue. Women will continue to defend themselves against the violent onslaughts experienced at home. Prosecutors who fail to understand battered women's actions as reasonable will continue to prosecute and to twist stories to win convictions. Defense counsel for battered women must continue to bring battering histories before the judge and jury at trial to show their clients' actions were reasonable. Until the legislative and judicial equalization of self-defense law is achieved, and until battered women receive the intervention they deserve, executive clemency continues to be a necessary forum for achieving justice in our system.

E. RETHINKING THE BATTERED WOMAN SYNDROME

Lenore Walker¹⁸³ should be lauded for her hard work in bringing the experiences of battered women defendants into the courtroom. Her research and advocacy, along with the drama of the cases in which expert opinion testimony has been presented, have spurred considerable legal

Turning to Self-Defense Pleas; Battered Wives and Self-Defense Pleas, WASH. POST, Dec. 4, 1977, at A1.

179. *Arrest May Be Deterrent in Domestic Violence, Study Shows*, N.Y. TIMES, May 30, 1984, at C4.

180. *Id.*

181. See NATIONAL WOMAN ABUSE PREVENTION PROJECT, *The Criminal Justice System's Response to Domestic Violence*, in DOMESTIC VIOLENCE FACT SHEETS (Mar. 1992) (Bureau of Justice statistics indicate arrest reduces future abuse by as much as sixty-two percent).

182. See Grossfeld, "Safer" and *In Jail*, *supra* note 32 (reporting that such killings are down twenty-five percent, citing testimony of psychologist Angela Browne before the Senate Judiciary Committee, Dec. 1990).

183. See *infra* notes 190-203 and accompanying text for description of Walker's research in exploring and defining the battered woman syndrome.

research and commentary.¹⁸⁴ Media attention has focused the public on the issues surrounding the conditions under which battered women kill when they act in self-defense. The movement seeking to introduce battered woman syndrome testimony and the ensuing dialogue over its use have spurred law reform efforts, public debate, and the clemency movements now underway in many states to release battered women from prison. Yet this energy may best be utilized to achieve changes in self-defense law that do not stress helplessness. This section sets forth some theories that may prove more effective in showing that a battered woman's action was reasonable and in dispelling the various myths and inaccuracies inherent in the public discourse over battered women who kill.

1. *The Expanding Syndrome*

Courts, legislators, and journalists repeatedly lump nearly all aspects of a battered woman's psychology and experience together and call the resulting "package"¹⁸⁵ the battered woman syndrome.¹⁸⁶ It is important to be specific, however, when discussing the syndrome. It is only one of many possible approaches that can explain why a woman's self-defensive action is reasonable. It should not be confused with the combination of social and economic pressures and emotions that operate to

184. See Schneider, *Describing and Changing*, *supra* note 78, at 196 n.5 (listing dozens of scholarly publications treating women's self-defense issues, many examining and applying the battered woman syndrome). See also Sharon Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 U.C.L.A. WOMEN'S L.J. 191 (1991); Rocco C. Cipparone, Jr., *The Defense of Battered Women Who Kill*, 135 U. PENN. L. REV. 427 (1987); Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393 (1988); Maguigan, *supra* note 69; Mahoney, *supra* note 175; Victoria Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545 (1988); David McCord, *Syndromes, Profiles, and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19 (1987); Rosen, *supra* note 74; Jill S. Talbot, *Is "Psychological Self-Defense" a Solution to the Problem of Defending Battered Women Who Kill?*, 45 WASH. & LEE L. REV. 1527 (1988).

Maguigan was prompted by the assumptions underlying the scholarly commentary on battered woman syndrome and women's self-defense work to conduct a research project and empirical analysis lasting over two years and surveying and tabulating over 200 cases and numerous articles. See Maguigan, *supra* note 69.

185. Crocker, *supra* note 78, at 150 (stating that the battered woman syndrome stereotype treats the information within the battered woman syndrome as "a package to be bought or not, rather than as evidence about the defendant's reasonableness").

186. See *supra* note 26 (reporters' inaccurate account of California Coalition's acceptance of petitioners' cases, stating they accepted them because they met the requirements of the "battered woman syndrome"). Even Elizabeth Schneider states, "Battered Woman Syndrome can also include a description of the psychological impact of the common social and economic problems which battered women face." Schneider, *Describing and Changing*, *supra* note 78, at 202-03.

keep a woman in a harmful relationship. Or at the least, if experts are relying on psychological and non-psychological evidence together, they should clearly state which behavior is consistent with the battered woman syndrome as a psychological behavioral model, and which behavior is simply consistent with the experience of many battered and non-battered women.

Nearly every type of expert testimony on battered women — including opinions and theories that do not rely on the battered woman syndrome research of Lenore Walker — has been confused with the original battered woman syndrome theory, so that practically all explanations for a battered woman's behavior, whether social, economic, psychological, or affective in nature, are suddenly "syndromic." This creates confusion and is an unprincipled use of the battered woman syndrome "label." One harmful effect of this mislabeling may be the exclusion of non-psychological evidence when a judge rules that no information on the "syndrome" will be admitted,¹⁸⁷ thus excluding expert testimony on other factors that would explain the woman's acts as reasonable.

This section seeks to alert clemency advocates and others to the possible limitations of using (or overstressing) expert testimony on battered woman syndrome in the preparation of petitions for clemency. Obviously, each case is different, and some facts fit the model well while others do not establish the "syndrome" as a viable explanation for a woman's self-defensive acts. Clemency decisions are inherently discretionary and judgmental, and not usually subject to judicial or legislative review.¹⁸⁸ A determination that a woman does not suffer from the battered woman syndrome's characteristic "helplessness" and "passivity" could result in denial of her petition for pardon or commutation if the decision-maker has been conditioned to look for tell-tale signs of battered woman syndrome.

In addition, California courts must now admit relevant expert opinion testimony on battered woman syndrome by statute, at least in criminal trials.¹⁸⁹ The California clemency effort — and others across the country — should not be seen as a "one-shot" effort to cure unjust results perceived to have occurred only because a woman did not introduce expert opinion testimony on the battered woman syndrome at trial. Clemency in battered women's cases should be used as long as necessary to correct unjust results when battered women who kill abusers are convicted despite the fact that they acted in self-defense.

187. See *infra* notes 237-38 and accompanying text.

188. See *infra* notes 333-34, 350-58 and accompanying text for discussion of challenges to grants of clemency.

189. CAL. EVID. CODE § 1107 (West Supp. 1992).

2. The "Actual" Syndrome

Most of the cases that have considered the admissibility of expert testimony have focused on the research of Lenore Walker, the main researcher on the battered woman syndrome.¹⁹⁰ In many cases courts have heard the testimony of Walker herself.¹⁹¹

Battered woman syndrome, as formulated by Walker, is a combination of two theories — the cycle of violence and learned helplessness — that attempts to describe why women endure repeated physical and psychological abuse at the hands of spouses or partners.¹⁹²

The cycle of violence theory posits that abusive relationships follow a pattern, beginning with a "tension building phase," which erupts into an "acute battering incident" and is followed by "loving contrition." The cycle repeats itself.¹⁹³ This theory is used at trial to explain that "although [the killing] may have occurred [sic] during a period of relative calm, the defendant was reasonable in her belief at the time of the act that the man presented her with a threat of imminent harm."¹⁹⁴

The learned helplessness aspect of the battered woman syndrome theory is offered to explain that many battered women do not leave and that therefore a woman was not unreasonable in her failure to leave.¹⁹⁵ A woman has no duty under the law to leave a relationship at some unspecified time before a battering incident that precipitates a killing.¹⁹⁶

190. Schneider, *Describing and Changing*, *supra* note 78, at 207.

191.

In the ninety-six cases of battered women who have killed or seriously hurt their abusers, almost all in self defense, I have been successful in introducing evidence of battered women [sic] syndrome through expert witness testimony at the trial of thirty-three cases and in the sentencing phase of thirty-two cases. In four cases the prosecutor dropped the charges In four other cases the testimony was not admitted. The remainder either have not yet come to trial or would not have benefited from such testimony.

Lenore Walker, *A Response to Elizabeth M. Schneider's Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 223, 224 [hereinafter Walker, *A Response*]:

It is unclear whether the thirty-three and thirty-two cases figures represent the same cases and what effect the testimony had on the disposition of the cases.

192. LENORE WALKER, *THE BATTERED WOMAN* 55-70 (1979) (describing the cycle of violence) [hereinafter WALKER, *BATTERED WOMAN*] and LENORE WALKER, *THE BATTERED WOMAN SYNDROME* 95-104 (1984) (describing the cycle of violence and learned helplessness) [hereinafter WALKER, *SYNDROME*].

193. WALKER, *BATTERED WOMAN*, *supra* note 192, at 55.

194. Faigman, *supra* note 84, at 626.

195. *Id.*; Schneider, *Describing and Changing*, *supra* note 78, at 201-02 (courts admit expert testimony to address the question, among others, of why an abused woman failed to leave the relationship).

196. GILLESPIE, *supra* note 30, at 81 (stating that the duty to retreat has "nothing

However, failure to leave the relationship is unfortunately a key question in the jury's mind¹⁹⁷ and one that prosecutors seize upon in making effective arguments to juries. Jurors are susceptible to suggestions that battered women liked the abuse,¹⁹⁸ brought it on themselves,¹⁹⁹ or exaggerated the danger they faced. After all, the woman had survived many severe beatings in the past.²⁰⁰ For these reasons, learned helplessness theory is offered to counter the prejudice against a woman who did not, for whatever reason, leave her abusive mate. In developing this aspect of the syndrome, Walker adapted the research of Martin Seligman²⁰¹ on dogs who "learned" they were helpless after repeated exposure to electric shocks.²⁰² The dogs failed to exert any control at all over their surroundings. Walker posited that the effect of battering on women is that "over time, [these acts] produce learned helplessness and depression as the 'repeated batterings, like electric shocks, diminish the woman's motivation to respond.'"²⁰³

3. Criticisms of Battered Woman Syndrome

Expert opinion testimony on battered woman syndrome has been the main issue considered on appeal in cases in which women have been convicted of killing abusers.²⁰⁴ The rapidity with which appellate courts have admitted the testimony has allowed little time for consideration of whether its admission at trial is in the best interests of women defendants asserting self-defense.

Many of those representing battered women who kill have competing views on the wisdom of using the battered woman syndrome. Trial attorneys and others recognize the need to include women's voices in court in

whatsoever to do with the question of why [she] didn't leave the relationship").

197. Schneider, *Equal Rights*, *supra* note 72, at 629.

198. *Id.*

199. *Id.*

200. Schneider, *Describing and Changing*, *supra* note 78, at 201.

201. See Martin Seligman, Steven Maier, and James Geer, *Alleviation of Learned Helplessness in the Dog*, 73 J. ABNORMAL PSYCHOL. 256 (1968).

202. WALKER, SYNDROME, *supra* note 192, at 86. In addition to learned helplessness, the third stage of the cycle, loving contrition, has been used to explain why a woman would stay. WALKER, BATTERED WOMAN, *supra* note 192, at 65-70; WALKER, SYNDROME, *supra* note 192, at 96.

203. WALKER, SYNDROME, *supra* note 192, at 87.

204. Schneider, *Describing and Changing*, *supra* note 78, at 200, 196-97 nn.7, 10, 201 n.27 (lists of appellate cases addressing the issue of admissibility of battered woman syndrome expert opinion testimony). For the first California appellate case to address the issue of admissibility of battered woman syndrome evidence, see *People v. Aris*, 215 Cal. App. 3d 1178 (1989) (one of four issues on appeal; the court held that expert opinion testimony is admissible but exclusion at Aris's trial was harmless error). In California such evidence is now admissible by statute. CAL. EVID. CODE § 1107 (West Supp. 1992).

order to educate the judge and jury about the prevalence of domestic violence and the ways in which women respond to the onset and continuation of such violence.²⁰⁵ Most agree that expert testimony of some kind is necessary.²⁰⁶ Underlying the criticism, however, is the notion that there are several modes of coping with battering. The learned helplessness that battered woman syndrome hypothesizes is only one explanation. Several authors also question the application of the battered woman syndrome to women of color.²⁰⁷

- (a) The failure of learned helplessness to prove its points about reasonableness and the failure to leave

Elizabeth Schneider, a prominent women's self-defense litigator and professor,²⁰⁸ has noted that the focus on learned helplessness, through the introduction of expert testimony on the battered woman syndrome, actually undercuts the woman's claim that her final act of self-defense was reasonable.²⁰⁹ Other commentators agree.²¹⁰ In fact, the act of killing highlights a fundamental theoretical inconsistency: if the woman is so helpless, why did she kill? If one relied on the actual results in the Seligman dog tests, one would not expect any assertion of control by the battered woman.²¹¹ Perhaps it is the women who are dying who have

205. Schneider, *Describing and Changing*, *supra* note 78, at 197-98.

206. Professor Mahoney argues that "we need more, not less" expert testimony, despite her acknowledgment that the battered woman syndrome may tend to stereotype battered women. Mahoney, *supra* note 175, at 42. Expert testimony regarding evidence of her theory, separation assault, *see infra* notes 218-23 and accompanying text, could be extremely useful in helping a jury understand the power dynamic in a battering relationship and the potential violent response a woman faces if she chooses to leave.

207. *See generally*, Allard, *supra* note 184. *See also* Mahoney, *supra* note 175, at 30 (citing Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 612-13 (1990)); Schneider, *Describing and Changing*, *supra* note 78, at 216 n.146 (citing Barbara Hart, in a letter to Schneider, Nov. 30, 1984).

208. Schneider was co-counsel for Yvonne Wanrow, *State v. Wanrow*, 559 P.2d 548 (1977) (Washington State Supreme Court case holding that Washington's objective standard for measuring reasonableness should incorporate subjective elements, allowing the jury to take into account how a reasonable woman in all the circumstances would have acted in defending herself, *see supra* notes 103-08 for discussion of *Wanrow*) and co-counsel for *amicus curiae* in *State v. Kelly*, 478 A.2d 364 (1984) (New Jersey Supreme Court case holding battered woman syndrome expert testimony admissible).

209. Schneider, *Describing and Changing*, *supra* note 78, at 199, 221.

210. *See, e.g.*, Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1433 (1990) (book review of GILLESPIE, *supra* note 30) (stating that women who arm themselves and kill their husbands are hardly the "helpless creatures" that battered woman syndrome depicts them to be); Rosen, *supra* note 74, at 15 ("there is an inherent inconsistency in arguing that a person whose perceptions are altered by a psychologically identifiable syndrome is nonetheless reasonable with regard to that syndrome").

211. *See* Faigman, *supra* note 84, at 640-41 (arguing that from the actual results of the Seligman dog tests and "from a theoretical perspective one would predict that if

the syndrome and not the ones who are killing.

In addition, Schneider argues that the syndrome resounds with the same sex stereotypes that women's self-defense work has sought to overcome.²¹² She argues instead that a woman's ability to act as a rational agent should play a large role in her defense.²¹³

Commentators have offered reasons other than learned helplessness to explain why women stay in battering relationships. Many have noted that commonly experienced social, economic, and emotional pressures explain why women remain in abusive situations.²¹⁴ Women may stay in battering relationships because of family concerns, economic dependency, security, religious or personal values, or a lack of perceived alternatives. In addition, both the prevalence of violence against women committed by partners²¹⁵ and the common lack of support for battered

battered women suffered from learned helplessness they would not assert control over their environment; certainly, one would not predict such a positive assertion of control as killing the batterer").

212. Schneider, *Describing and Changing*, *supra* note 78, at 197. See also Crocker, *supra* note 78, at 136-37; Mahoney, *supra* note 175, at 4 (stating that "expert testimony on battered woman syndrome and learned helplessness can interact with and perpetuate existing oppressive stereotypes of battered women").

213.

Expert testimony which emphasizes or is heard to emphasize only battered women's helplessness or victimization is necessarily partial and incomplete because it does not address the crucial issue of the woman's action, or her agency in a prosecution for homicide — namely, why [she] acted Our explanation of the reasonableness of their claims [must] take both their victimization and their agency into account.

Schneider, *Describing and Changing*, *supra* note 78, at 221.

214. Crocker, *supra* note 78, at 134-35 (stating that several reasons exist for a battered woman's reluctance to seek help: the lack of response on the part of law enforcement officials to calls for help, the increased danger a woman faces after calling police, the inability or unwillingness of friends or family to provide shelter, and the embarrassment of a failed marriage); Faigman, *supra* note 84, at 622, 643-45 (arguing that courts should admit the history of violent abuse, as well as empirical evidence of economic and social factors); Mahoney, *supra* note 175, at 20-21 (arguing that in addition to denial, pregnancy and family attachments also explain why women stay); Schneider, *Describing and Changing*, *supra* note 78, at 203 (police and courts' failure to protect battered women; lack of a job, child care, adequate housing and services; isolation; shame; and the illusion that he will change all account for her staying).

215. In the United States a woman is more likely to be assaulted, injured, raped, or killed by a male partner than by any other type of assailant. NATIONAL WOMAN ABUSE PREVENTION PROJECT, *General Facts About Domestic Violence*, in DOMESTIC VIOLENCE FACT SHEETS (Mar. 1992) (citing A. Browne and K.R. Williams, Resource Availability for Women at Risk: Its Relationship to Rates of Female-Perpetrated Partner Homicide (paper presented at the American Society of Criminology annual Meeting, Nov. 11-14, 1987, Montreal, Canada)). Research suggests that wife-beating results in more injuries that require medical treatment than rape, auto accidents, and muggings combined. *Id.* (citing E. Stark and A. Flitcraft, *Medical Therapy as Repression: The Case of Battered Women*, HEALTH & MEDICINE 29-32 (Summer/Fall

women²¹⁶ support the conclusion that *most* battered women stay.²¹⁷

Another sobering explanation for a woman's failure to leave is the level of violence perpetrated against women *after* they leave abusive mates. Professor Martha Mahoney has argued for a recognition of "separation assault,"²¹⁸ which she defines as an "assault on a woman's body and volition [in which her partner] seeks to block her from leaving, retaliate for her departure or forcibly end the separation."²¹⁹ Although Mahoney argues that battered woman syndrome and learned helplessness are relevant, she notes that "[l]earned helplessness is in essence a theory of deficiency at perceiving exit."²²⁰ Separation assault, on the other hand, "confirms the difficulty of exit" and "supports that aspect of battered woman's [sic] syndrome which emphasizes the woman's reasonableness and the normal character of her reaction to violence."²²¹

Mahoney argues that separation assault exposes battering as a power struggle²²² and that society's failure to acknowledge this species of violent assault against women reflects a deep-seated cultural denial of the severity of battering in order to protect the institution of marriage.²²³ This is the sort of denial and misconception that must be eradicated at trial. Juries must understand that leaving has enormous consequences because it refutes the power dynamic that the batterer needs and has come to expect. Jurors and judges must be shown that women are not at fault, much less guilty, for not leaving under the possibility of such violence. Thus, Mahoney's theory of separation assault, and its manifestation in women's lives, fear of reprisal, offer an alternative reason why women remain in battering relationships.

It should be noted as well that even a battered woman may deny that she is battered, and she may not leave because she denies the gravity of her situation. This denial can explain inconsistent statements, previous denials of abuse, or statements that seek to minimize the level of abuse. This perceived negative aspect of denial, together with the positive aspect

1992)). The Federal Bureau of Investigation reported in 1986 that thirty percent of female homicide victims were killed by husbands or boyfriends, while only six percent of male homicide victims were killed by wives or girlfriends. *Id.* (citing FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (1986)).

216. See *supra* notes 177-82, 214 and accompanying text.

217. See Crocker, *supra* note 78, at 135 (a battered woman's response in not leaving is "molded by the passivity in which women have been trained. A battered woman who does not leave . . . , seek help, or fight back is behaving according to societal expectations"); Mahoney, *supra* note 175, at 15.

218. Mahoney, *supra* note 175, at 5-6.

219. *Id.* at 6.

220. *Id.* at 81.

221. *Id.*

222. *Id.* at 5-7.

223. *Id.* at 10-19.

of self-respect, combine to make "women reject an image of degradation and incapacitation."²²⁴

Other experts have also suggested broader bases for testifying about the perceptions of battered women, especially in their final acts of violence.²²⁵ Julie Blackman, a psychology professor and expert witness, describes several categories of change that occur in battered women.²²⁶ First she observed psychological traits that she termed learned helplessness.²²⁷ She also observed a "high tolerance for cognitive inconsistency."²²⁸ This tolerance for cognitive inconsistency, like Mahoney's acknowledgment of denial, allows a woman to express two seemingly logically inconsistent ideas alongside one another and "grows out of the fundamental inconsistency of a battered woman's life: that the man who supposedly loves her also hurts her."²²⁹ For instance, a woman may claim that the batterer only hits her when he is drunk, yet she may then describe beatings when he was not drunk. Blackman stated that such inconsistent statements could be interpreted as poor memory or a bungled attempt to be deceptive.²³⁰ They may also indicate denial. The battered woman may claim initially that she was never battered then testify to battering incidents at trial. Or she may never have admitted to herself that she was a battered woman. Blackman also observed a coping mechanism in which battered women focus their energies on survival because of a reduced perception of alternatives.²³¹

Although these three findings — learned helplessness, cognitive inconsistency, and an inability to perceive options — suggest impairment, the fourth category of change she observed was an increased ability to "rate" the tolerability or survivability of episodes of violence.²³² A battered woman learns to rate the violence by developing detailed knowledge of her partner's violence and the continuum on which it exists.²³³

224. *Id.* at 25.

225. Julie Blackman, *Potential Uses For Expert Testimony: Ideas Toward The Representation Of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227 (1986).

226. *Id.* at 227 n.1.

227. *Id.* at 228. Blackman states that women may experience depression and "psychological changes that cause them to believe that they are unable to control what happens to them, and in particular that they are unable to stop the violence."

228. *Id.* (citing J. Blackman, *Quantitative and Qualitative Perspectives on Violent and Non-Violent Intimate Relationships* (1980) (unpublished paper presented at the 1980 American Psychological Association Annual Meeting, on file with Blackman)).

229. *Id.* at 228-29.

230. *Id.* at 229.

231. *Id.* (maintaining that battered women "survive in and cope with abusive relationships by minimizing the severity of the violence they endure and minimizing the need to respond").

232. *Id.*

233. *Id.*

Blackman argues that the level of violence experienced by battered women who kill is remarkably severe and frequent compared to those battered women who do not kill, and "they know what sorts of danger are familiar and which are novel."²³⁴ Although Blackman still identifies her observations as a "syndrome,"²³⁵ she argues that the fourth category is evidence not of impairment but of an enhanced capacity, an affirmation of the reasonableness of the need to act.²³⁶

All these theories and criticisms recognize that learned helplessness is not the only explanation for a woman's decision to stay. She may instead be staying for a variety of social and cultural reasons, out of fear of reprisal for leaving, or because she has learned to be a survivor. Advocates, and those who will be deciding clemency petitions, should learn to look as much for these signs as they look for evidence of helplessness in answering their questions about battered women's actions.

(b) The failure of the battered woman syndrome to protect all battered women

It has been noted that the focus on the battered woman syndrome and its manifested characteristics may actually deprive some severely battered women of the "privilege" of asserting self-defense because in some way they do not fit the stereotypical passive, submissive syndrome model.²³⁷ Particularly disturbing are the cases in which a defendant has resisted or tried to resist violence in the past. Courts may accept such resistance as evidence that rebuts her "status" as a battered woman.²³⁸

234. *Id.*

235. *Id.* at 228, 229.

236. *Id.* at 229.

237. Crocker, *supra* note 78, at 144, 149.

238. *See id.* at 144 n.6 (Crocker describes the following cases, among others: *State v. Denny*, 55 P.2d 111 (Ariz. App. 1976) (defendant intentionally ran into husband with car); *Mullis v. State*, 282 S.E.2d 334 (Ga. 1981) (court held simply that exclusion of expert testimony was proper where the evidence indicated that the defendant had the ability to fight back, as demonstrated by her repeated defense of herself against her husband's attacks); *Strong v. State*, 307 S.E.2d 912 (Ga. 1983) (defendant threatened to kill husband); *State v. Anaya*, 438 A.2d 892 (Me. 1981) (court ruled that evidence that the defendant had once stabbed her boyfriend with a knife during an encounter in which he kicked her, held a knife to her throat, and threatened to kill her, was admissible to refute "the battered wife defense," casting doubt on whether the defendant had "most frequently react[ed] with passivity"); *People v. Powell*, 424 N.Y.S.2d 626 (Tompkins Co. Ct. 1980) (prosecution witness testified that defendant stated she wanted to kill deceased); *State v. Norris*, 279 S.E.2d 570 (N.C. 1981) (defendant previously shot husband in self-defense); *State v. Kelly*, 655 P.2d 1202 (Wash. 1982) (appeals court allowed evidence that defendant had threatened a neighbor and pounded on the house and her husband's car when he locked her out of the house as rebuttal evidence "bear[ing] on whether the defendant is a battered woman"); *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981) (defendant once threatened husband with

The inclination of courts to view the battered woman syndrome as a standard to which women must conform and to exclude evidence because the woman is not a "good" battered woman realizes some of the fears of early critics and recent writers. These value judgments are also possible in executive clemency review. The negative ramifications of overstressing the syndrome and its stereotypic elements should be considered before relying too much on the battered woman syndrome as an argument for clemency.

- (c) A novel scientific theory: Passing the test without making the grade?

In addition to the theoretical inconsistency of learned helplessness, the methodology of the research has been questioned.²³⁹ This criticism focuses on the research methods of the most prominent researcher and expert witness, Lenore Walker.

Professor David Faigman, an advocate of the use of social science data in the law, has criticized the courts' reluctance to scrutinize the data at trial and the failure of commentators to do so in their writings.²⁴⁰ He examined the methodology underlying both the cycle theory²⁴¹ and the theory of learned helplessness²⁴² and concluded that the research was not yet sufficiently developed to warrant the use of expert opinion testimony as evidence in self-defense cases. Faigman maintains that "it is a mistake to use one theoretical construct to describe all women who are victims of domestic violence."²⁴³

Many appellate courts have ruled that expert testimony on battered woman syndrome is admissible when the requirements, including acceptability of methodology, for admitting expert testimony are demon-

shovel; his response was to beat her about the head, neck, and shoulders with a pair of work boots).

239. See, e.g., Faigman, *supra* note 84.

240. *Id.* at 630 n.56 (discussing cases in which courts "deliberately eschew" an examination of research methodology). Faigman states that, "The validity of the evidence on battered woman syndrome has received little critical attention in either the courtroom or the legal literature Commentators have wholly neglected the empirical flaws of the research." *Id.* at 630-31.

241. Faigman notes five "methodological and interpretive" flaws: the use of leading questions; influence of experimenter expectancies; failure to place the three stages of the cycle into a time frame; failure to demonstrate empirically the link between the cycle and the "cumulative terror"; and Walker's conclusion that her findings establish the existence of a distinct behavioral cycle. *Id.* at 637-39.

242. Faigman noted three flaws in the learned helplessness methodology: the failure to conduct tests of statistical significance and the reliance on seemingly minute differences in scores; the failure to interview a control group of women not in battering relationships; and the fact that Walker's subjects had never in fact killed anyone. *Id.* at 642.

243. *Id.* at 644.

strated,²⁴⁴ and courts have remanded cases to trial courts to determine if the expert met the standards of the court. A few trial courts excluded testimony because the expert had failed to establish general acceptance of the methodology used in the particular studies he or she was relying upon as a basis for the proffered expert testimony.²⁴⁵

These criticisms of Walker's methodology may be close to moot because of the overwhelming number of jurisdictions in which her work has been accepted. Empirical criticism is useful, however, in helping to change the focus from a paradigm model to a more practical view that realizes that the experiences of battered women, and not a psychological profile that may not apply to all battered women, can explain their actions.²⁴⁶ It may also spur additional research to meet the criticism.

These criticisms help focus attention on the situations of women who act reasonably in self-defense but for whose actions the battered woman syndrome is simply not a viable explanation. As stated, the battered woman syndrome research and advocacy has also been beneficial. But such a single psychological paradigm may be inadequate to explain why so many battered women kill batterers in defense of themselves and their children.

244. See, *Dyas v. U.S.*, 376 A.2d 827, 832 (D.C. App. 1976) (discussing three-part test for admissibility of expert opinion testimony on novel scientific theories: that the subject matter be so distinctly related to some science as to be beyond the ken of the average juror, that the witness have sufficient skill, knowledge or experience in the area to aid the trier of fact, and that the state of the pertinent art have advanced to allow a reasonable expert opinion to be given); *Frye v. U.S.*, 293 F. 1013 (D.C. App. 1910). See also *Ibn-Tamas v. U.S.* (I), 407 A.2d 626, 635-39 (D.C. 1979); *Terry v. State*, 467 So.2d 761, 764-65 (Fla. Dist. Ct. App. 1985); *Borders v. State*, 433 So.2d 1325, 1326 (Fla. Dist. Ct. App. 1983); *Hawthorne v. State* (I), 408 So.2d 801, 805-07 (Fla. Dist. Ct. App. 1982); *Smith v. State*, 277 S.E.2d 678, 683 (Ga. 1981); *People v. Minnis*, 455 N.E.2d 209, 217-18 (Ill. 1983); *State v. Hodges*, 716 P.2d 563, 568-69 (Kan. 1986); *State v. Anaya* (I), 438 A.2d 892, 894 (Me. 1984); *State v. Kelly*, 478 A.2d 364, 469-73 (N.J. 1984); *People v. Torres*, 488 N.Y.S.2d 358, 362-63 (N.Y. Sup. Ct. 1985); *State v. Allery*, 682 P.2d 312, 315-16 (Wash. 1984).

245. *Ibn-Tamas v. United States* (II), 455 A.2d 893 (D.C. 1983); *Hawthorne v. State* (III), 470 So.2d 770, 773-74 (Fla. 1st Dist. Ct. App. 1985).

246. But see *Mahoney*, *supra* note 175, at 42 (arguing that expert testimony on the syndrome is "correct" because women's stories are brought into court in a way that is "descriptively true of many women" and that the syndrome can be a "tool . . . to explain women's experiences").

III. THE CLEMENCY POWER, PUNISHMENT, AND THE POTENTIAL OF CLEMENCY AS A TOOL FOR ACHIEVING JUSTICE

A. TROUBLING QUESTIONS ABOUT CLEMENCY'S ROLE IN OUR SYSTEM OF PUNISHMENT

Clemency is usually relief imparted after the judicial system has run its course, although one may be pardoned even before being formally accused or convicted.²⁴⁷ The use of the clemency power to set aside convictions or release convicted prisoners thus questions basic assumptions underlying our criminal justice system. Have the traditional safeguards that ensure justice — prosecutorial discretion, trial by jury, and appellate review — failed to render just results in so many battered women's cases? Are the sentences of these women fair under the law, or has society failed to protect one of its constituent groups through the law? Is it proper for the executive to remedy the "excesses of the judiciary and the legislature"²⁴⁸ through his or her executive power of clemency?

The propriety of the institution of clemency is usually questioned following unpopular uses of the power.²⁴⁹ Even though some uses of the

247. KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST* 5 (1989) (such as Gerald Ford's pardon of Richard Nixon in 1974). See also *infra* note 329 (regarding George Bush's recent pardon of Caspar Weinberger, his former Secretary of Defense, who had been indicted but not yet tried in the Iran-Contra scandal).

Pre-conviction pardons are not improper legally, as the federal clemency power has been interpreted extremely broadly:

The power thus conferred is unlimited [except in cases of impeachment]. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power . . . is not subject to legislative control The benign prerogative of mercy reposed in [the President] cannot be fettered by any legislative restrictions.

Ex parte Garland, 71 U.S. (4 Wall.) 333, 380 (1866).

248. Daniel T. Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 OHIO ST. L.J. 655, 659 (1992) [hereinafter Kobil, *Do the Paperwork*].

249. MOORE, *supra* note 247, at 217 (Sen. Walter Mondale sought to introduce legislation limiting the pardoning power after President Gerald Ford pardoned former President Richard Nixon). Legislators in Ohio sought to restrict the power of the governor in that state after the unpopular commutations of eight death sentences at the close of former Governor Richard Celeste's term. Kobil, *Do the Paperwork*, *supra* note 248, at 658-59. And prosecutors have argued that clemency in battered women's cases ignores the trial court's finding and is an improper use of the governor's power. See *supra* note 4.

clemency power engender fierce criticism, provisions for its use exist in every judicial system in the world except China's.²⁵⁰ The clemency power serves as a powerful and necessary tool in an imperfect and all-too-human system of justice. As a result, rather than questioning whether the power is consistent with our system, we should ask how the power can best be used to augment our system of justice.²⁵¹

An executive, in granting clemency, should ensure that justice is done. He or she should do so by considering theories of punishment and justice that account for the debt paid by the prisoner, her moral blameworthiness, society's interests, and notions of fairness. Two theories of justice, retributivism and utilitarianism,²⁵² provide support for justifying executive acts of clemency in battered women's cases, answering the charges of those who believe that a governor should not "legislate away what a jury has found."²⁵³

At trial, jurors and judges must decide whether a particular killing is a crime and, if so, what punishment the offender deserves. The idea that people "ought to get the punishment they deserve" is known as retributivism.²⁵⁴ Those who adopt this view believe that defendants should receive punishment only if they are morally blameworthy and have gained an unfair advantage over others through the commission of their acts. Retributivists begin from the premise that society's law are

250. Kobil, *Mercy Strained*, *supra* note 3, at 575. See also *infra* notes 311-17 for a discussion of the development of the clemency power.

251. Professor Kobil argues that executive clemency is a "powerful but necessary check on legislative and judicial branches that permits the governor to correct miscarriages of justice that would otherwise be without a remedy." Kobil, *Do the Paperwork*, *supra* note 248, at 695. But he has argued elsewhere that the clemency power should be exercised in a principled manner, most effectively through a "bifurcated" clemency process that allows an impartial board to make "justice-enhancing" grants of clemency, while the executive could retain the power to make "justice-neutral" grants of clemency. See Kobil, *Mercy Strained*, *supra* note 3, at 622.

252. A full discussion of theories of punishment is beyond the scope of this article. For a more complete consideration of retributive justice, see IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS* (1965); MOORE, *supra* note 247; GEORGE SHER, *DESERT* (1987). For works on the principle of utility and its application to punishment, see JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1948); JEREMY BENTHAM, *OF LAWS IN GENERAL* (1970); JEREMY BENTHAM AND THE LAW: A SYMPOSIUM (George Keeton and George Schwarzenberger eds. 1948); DAVID LYONS, *IN THE INTEREST OF THE GOVERNED* (1978).

For a discussion of theories of justice in general, see GEORG WILHELM FRIEDRICH HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* (1942); KAREN LEBACQZ, *SIX THEORIES OF JUSTICE: PERSPECTIVES FROM PHILOSOPHICAL AND THEOLOGICAL ETHICS* (1986); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

253. See *supra* note 4 (noting reaction of Ohio prosecutor to the grant of clemency in Ohio by Governor Richard Celeste).

254. MOORE, *supra* note 247, at 92-94.

agreed-upon rules to limit the freedom of individuals so that one person may not gain an unfair advantage by upsetting a fair apportionment of rights and duties.²⁵⁵ A defendant deserves the sentence imposed by society to restore the balance upset through the gain of her unfair advantage when she meets the retributive requirements of liability and moral desert.²⁵⁶ As applied to battered women who kill, a retributive analysis that considers legal and moral blameworthiness and a fair balance of rights and duties justifies clemency.²⁵⁷

For most people, however, concerns in addition to desert inevitably play a role in the determination of whether a sentence is just. Professor Daniel Kobil argues that retributivist principles are central to our system of criminal justice, but so too is the idea that justice is fairness.²⁵⁸ He defines justice as "fairness under the law that renders each person her due"²⁵⁹ and states that retributive principles should not be the "sole guideposts in clemency decisions."²⁶⁰ In addition to notions of fairness, utilitarian considerations (the greatest good for the greatest number of people) strongly indicate that clemency for battered women is appropriate.²⁶¹

The following analysis of battered women's cases and clemency is largely derived from applying the pardon theories of Professors Moore and Kobil to the cases in which battered women kill. Depending on the facts of the various cases, most battered women's actions should fit into one or more of the categories that justify executive clemency.

Since punishment should be meted out only when deserved, it would follow that clemency should be granted only when deserved.²⁶² In addition, society's welfare and interest should be considered in granting clemency. Governor Wilson should recognize that most of the women in the petition group do not deserve to be incarcerated for their acts. Commutations of their sentences, or pardons, are proper and may be mandated by the failings of that system.

255. *Id.* at 93, 142-43.

256. *Id.* at 122-26, 142-43.

257. See Kobil, *Mercy Strained*, *supra* note 3, at 579 (citing MOORE, *supra* note 247, at 94-95). See *infra* notes 263-92 for full retributive analysis.

258. Kobil, *Mercy Strained*, *supra* note 3, at 581.

259. *Id.* at 582.

260. *Id.* at 581.

261. Justice Holmes' statement that clemency, "[w]hen granted . . . is the determination of the ultimate authority that *the public welfare will be better served* by inflicting less than what the judgment fixed," recognized the utilitarian aspects of the clemency power. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (emphasis added).

262. MOORE, *supra* note 247, at 89.

1. A Retributivist Analysis

Some retributivists do not see any place for pardons within a theory of justice based upon deserved punishment.²⁶³ Others see no irony in a principled exercise of the clemency power to correct injustice.²⁶⁴

Moore has argued that granting clemency becomes "a duty of justice that follows from the principle that punishment should not exceed what is deserved."²⁶⁵ She argues that because retributivist theory has been so successful in ending the "rehabilitation model" of sentencing²⁶⁶ and punishment, a retributive theory of pardon is now essential to account for cases in which pardon is justified.²⁶⁷

Moore's retributivist²⁶⁸ theory of pardons would mandate a pardon when a convicted person is not at all "liable to punishment."²⁶⁹ She argues that grants of clemency are justified when a person is liable to punishment for her acts but is not morally blameworthy.²⁷⁰ Innocence, excusable crime, and justified crime indicate the absence of moral

263. *Id.* at 90 ("[The] profligate use of pardon[s]" spurred "the great retributive theory of Immanuel Kant."), 28 (Kant's theory of punishment mandates, in an ideal state, a categorical moral obligation to punish those who have committed crimes). See also KANT, *supra* note 252, at 99-108.

264. See also Kobil, *Do the Paperwork*, *supra* note 248, at 697 ("Inasmuch as retributive concerns substantially underlie our system of justice, I believe that standards which focus on whether the offender deserves the punishment imposed would be helpful in assessing whether clemency is appropriate, although rehabilitative principles may also be deemed relevant").

265. MOORE, *supra* note 247, at 12 (emphasis added).

266. This influence can be seen in the new federal sentencing guidelines, adopted in 1984, ending indeterminate sentencing, a part of the rehabilitative model of punishment. *Id.* at 61, 67-72. See U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL 2 (1993) (In enacting the Sentencing Reform Act of 1984, Congress sought, in addition to achieving uniformity and proportionality of sentences, "to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence . . .").

267. MOORE, *supra* note 247, at 10. See also Kobil, *Mercy Strained*, *supra* note 3, at 611 ("[The new guidelines] have created an increasing need for clemency as a means of remitting punishment in a principled and consistent fashion").

268. There is a distinction between "legal retributivism" and "moral retributivism": legal retributivists argue that a person's punishment is deserved because of the act he or she has committed — because he or she has gained an unfair advantage over law-abiding citizens; moral retributivists argue that a person's deserved punishment is best decided based upon what kind of person she is, whether she has morally deserved a certain punishment, and whether she is or is not morally reprehensible. MOORE, *supra* note 247, at 11, 94-95. I combine the elements of both approaches in this discussion.

269. Liability is "measured by the degree to which an act actually upsets a fair apportionment of rights and duties." *Id.* at 145. "Liability, as defined by legalistic retributivism, is a necessary condition for punishment. In the absence of liability, offenders must be pardoned." *Id.* at 97.

270. *Id.* at 95.

blameworthiness in an act and justify the use of the clemency power.²⁷¹ In addition, adjusting a harsh sentence to comport with a prisoner's deserved sentence is justified,²⁷² although the conclusion that a sentence is unfairly disproportionate may not address the blameworthiness of the actor.

(a) Substantial doubt in the integrity of the conviction

Moore includes under innocence false convictions and convictions in which the defendant was incapacitated in some way,²⁷³ thus reducing her blameworthiness. Although some battered women have been acquitted of killing their husbands or lovers on insanity defenses,²⁷⁴ mental incapacity defenses are not endorsed by litigators,²⁷⁵ and women may end up in a hospital for longer than they would have been in jail.²⁷⁶ In addition, it does the goals of feminist self-defense work no service to argue for clemency on grounds of insanity unless, of course, that particular petitioner was insane at the time. Most women who killed and are now applying for clemency were not appropriate candidates for such defenses.

Although learned helplessness has also been interpreted as incapacity, it has been offered primarily to explain why a woman stays in an abusive relationship. Learned helplessness does not address the issue of a woman's capacity when she acts in self-defense; as a result, it does not affect her blameworthiness. To the contrary, the act of killing shatters the "learned helpless" mold.

More helpful in this regard is Kobil's argument that when there is substantial doubt of guilt a sentence should be remitted.²⁷⁷ Factors casting doubt on guilt include "new evidence, information suppressed at trial . . . or any other reason that seriously undermines . . . confidence in the integrity of the judicial determination [of guilt]."²⁷⁸ Prosecutorial zeal, unwarrantedly stiff charges, and unfair self-defense laws all impugn

271. *Id.* at 97.

272. *Id.* at 98 (this is consonant with the retributivist ideal that a punishment should not exceed what is deserved).

273. *Id.* at 132, 131-41.

274. See FAITH McNULTY, *THE BURNING BED* (1980) (describing Francine Hughes' case, in which she killed her sleeping husband and was acquitted on an insanity plea).

275. See Rosen, *supra* note 74, at 15, citing Schneider, *Equal Rights*, *supra* note 72, at 638 (result of insanity or diminished capacity defense could lead to civil incarceration); Schneider and Jordan, *Representation*, *supra* note 69, at 159-60 (writing in 1978, "Today, an impaired mental state defense should be considered only as a last resort, with full awareness of its social implications").

276. See *id.* (the implications of succeeding on an impaired mental state defense include the possibility of mandatory or discretionary commitment to a mental facility).

277. Kobil, *Mercy Strained*, *supra* note 3, at 624.

278. *Id.* at 624-25.

the integrity of the system under which battered women are tried. In addition, the refusal or inability of jurors to recognize the reasonable nature of a battered woman's response to a fear of imminent harm undermines the integrity of the determination of guilt itself. Viewed in this way, the sentences of many battered women should be remitted. Although there may not be doubt that the killing occurred and that she did it, there may be legitimate doubt as to her guilt on the *criminal* charge.

(b) Excusable acts

Defendants who commit crimes that have no tangible or intangible gains may be excused from punishment by executive clemency. Crimes with no tangible gain include unsuccessful attempts and "repaired crimes."²⁷⁹ The unsuccessful attempt rationale does not apply to battered women who kill. The repaired crimes principle, however, is relevant to determining their deserved punishment. At the same time, it highlights the controversy in these cases. Arguing that the man's death corrects past wrongs may seem like vigilante justice. Indeed, those arguing that battered woman syndrome is dangerous fear that it allows "a private right to impose the death penalty."²⁸⁰

However, we should not shrink from applying the repaired crimes principle in battered women's cases merely because they involve death.²⁸¹ These cases are more difficult than the innocuous theft of an umbrella, for example.²⁸² However, the reality is that any practical inquiry into whether an offender's act repairs a past wrong will focus on difficult cases, even those involving death.

Under retributive theory, a battering husband gains an unfair advantage over his victim every time he batters her. He acquires the tangible gain of domination and power and the intangible gain of the freedom to disregard the laws against battery, assault, rape, and attempted murder, among others. The woman who kills in self-defense is removing those advantages unfairly won by the batterer, gained over years of abuse.

279. *Id.* at 144-51.

280. See Naylor, *Schaefer Releases Fears*, *supra* note 4 (quoting Jon Scully of the conservative Washington Legal Foundation). See also *People v. Aris*, 215 Cal. App. 3d 1178, 1188 (1989) (court claimed even partial justification on defendant's claim of self-defense would amount to a right to impose the death penalty on an abuser).

281. Commentators may shy away from this justification. For example, Kobil has stated that a battered woman's clemency case may be justified retributively because of a diminished psychological culpability or because her sentence is unduly harsh. Kobil, *Do the Paperwork*, *supra* note 248, at 678-79. While each of these may also be justifications, they are not the only ones.

282. Moore describes the case of mutual theft of umbrellas by C and D, in which the second theft both repairs the crime of the first theft and leaves the first thief with no tangible gain. MOORE, *supra* note 247, at 147.

Governors, in deciding clemency petitions, may validly apply the repaired crimes justification to the cases of battered women who kill without endorsing vigilante justice. The cases before the governor, and the majority of cases in which battered women kill, are confrontational. When a woman acts in aggression and is successful in killing her batterer it is not the deliberate and cold-blooded act of vengeance many suppose. She acts to save her own life. The woman *herself* does not dispassionately decide she will repair the past crimes by murdering her batterer, although that is the result. In other words, even if repairing past wrongs is not her motivation, it may still be her justification.

Once we accept the realities under which battered women act, we can decide whether a battered woman morally deserves no punishment based upon her act. We may instead decide that her act does no more than restore a fair apportionment of rights and duties. The key is that her right is to defend herself, and her duty is to do so only when she has a subjectively reasonable fear of imminent (using the broader definition) bodily harm. The conclusion must be that a battered woman has not won a tangible gain, or that her tangible gain (being free of the batterer) is no more than what she has suffered over years of violent or cruel abuse.

(c) Morally justified acts

Clemency may be deserved when the petitioner's act was illegal but not immoral.²⁸³ For purposes of this part I will adopt the view of many that the killings by battered women are not legally justified under the law as it stands. However, this assumption does not foreclose the conclusion, upon review by the clemency board or governor, that the act was not *morally* justified. There are areas in which "the law and morality can fail to coincide."²⁸⁴

Many battered women do not deserve punishment because their acts were morally justified. Even if self-defense law has not sufficiently evolved to allow women to defend themselves legally when they most need to, it does not follow that a woman may not morally do so. The law of self-defense itself grew out of a custom in England in which common law courts, despite accepting in principle that claims of self-defense were justifications for some killings, would convict the defendant and direct her to seek a pardon from the king.²⁸⁵ This practice continued frequent-

283. *Id.* at 157. Moore addresses mercy killings and conscientious objector situations under her theory of justified crimes. *Id.* at 155-65. However, her recognition that an illegal act is not necessarily an immoral act is relevant to cases in which battered women kill their abusers.

284. *Id.* at 155.

285. See GILLESPIE, *supra* note 30, at 33 (describing the ancient case of Alice of the Assize of Northumberland, and the general practice of dutifully convicting and

ly until the law of self-defense and other doctrines of justification were incorporated into the substantive criminal law.²⁸⁶ In addition, grants of clemency have been used to void valid convictions arrived at under valid but unpopular laws.²⁸⁷ These practices indicate that there have long been situations in which society at least accepted, if not approved of, moral actions that were not in conformance with inadequate or unpopular laws.

When a battered woman is morally justified in defending herself, she has done nothing wrong and deserves no punishment. Moore considers an act "morally justified" if it is "an act that would be performed by a morally courageous person correctly evaluating all conflicting demands."²⁸⁸ Such a definition appears close to the test for reasonableness in self-defense. However, it is not necessarily as constrictive because the governor or clemency board member is not bound by strict rules of precedent narrowly defining the "correct," and therefore justified, action. To fairly appraise whether a battered woman's act was justified, the person making that determination should consider whether a morally courageous person in those circumstances, knowing what she knows, would have performed the same action, evaluating all conflicting demands. Such an inquiry could well result in a finding that the actions of many battered women may be justifiable in a moral sense, regardless of whether they are justifiable under strict interpretations of substantive criminal law terms.

In addition, Kobil has stated that battered women's clemencies may justly be based on the diminished culpability of the offender.²⁸⁹ Elsewhere, Kobil has stated that diminished mental *capacity* (in addition to disproportionate sentence or substantial doubt as to guilt) would support clemency.²⁹⁰ It is more helpful to focus on the culpability, as Kobil has done, rather than the capacity of the battered woman when she acts.

sentencing those who killed in self-defense and instructing the convicted to appeal to the king for a pardon). This custom was later codified in the Statute of Gloucester of 1278, which remained law for over 300 years; the statute required trial and conviction in cases where a killing resulted from accident or self-defense, but the convicted party was encouraged to apply to the King for a pardon. *Id.*

286. See MOORE, *supra* note 247, at 223 (citing the United States pardon attorney, who stated that, "We have seen that the law of insanity, of self-defense, of compulsion and the improved treatment of the juvenile offender started from the practice of pardoning in cases where the strict application of the law seemed undesirable").

287. *Id.* at 158 (stating that numerous pardons were granted under Prohibition laws, when offenders were deemed to have broken the law but not to have done anything wrong), 222-23 ("anecdotal accounts . . . make it clear that, in some general areas of the law, presidents and governors are not satisfied with the job the laws are doing").

288. *Id.* at 161 (citing Kent Greenawalt, *Vietnam Amnesty: Problems of Justice and Line-Drawing*, 11 GA. L. REV. 1, 9 (1976)).

289. See *supra* note 281.

290. Kobil, *Do the Paperwork*, *supra* note 248, at 697.

Because many of the factors that explain why a woman stays are relevant to her capacity to leave and not to her capacity to defend herself, it is more fruitful to consider whether she is morally *culpable* in acting to defend herself. Because most battered women who kill do so out of a fear, reasonable or unreasonable, of imminent bodily harm or death, their culpability is diminished even if their actions do not conform to the requirements of the substantive law definitions of that jurisdiction.

(d) Correcting unduly harsh sentences

It has been argued that women receive harsher sentences for killing their husbands in self-defense than men receive for killing wives or girlfriends in battering incidents or in rage.²⁹¹ A full empirical study should

291. Women who kill their abusers receive stiffer sentences than men who kill their wives. ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 11 (1987) (FBI statistics indicate men are less likely to be charged with first- or second-degree murder for killing a woman they have known than are women who kill a man they have known; women who are convicted receive longer sentences); ANN JONES, *WOMEN WHO KILL* 9 (1980) (for lesser offenses sentences are roughly equal, but for more violent offenses women receive harsher sentences); NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, *NEWSLETTER* 12 (Winter 1989) (abusive men who kill partners serve an average of two to six years; women who kill partners serve an average of fifteen years). See also Hansen, *supra* note 174 (women charged with homicide have fewest prior convictions of any other class of offenders but are more likely to serve longer sentences than men who kill those with whom they are intimate).

In *Commonwealth v. Grimshaw*, 590 N.E. 2d 681 (Mass. 1992), the jury apparently struggled with the facts of the case and returned a verdict of manslaughter only to have the judge sentence the defendant severely. Despite the apparent planning and violent nature of the killing, the jury returned a manslaughter verdict, but the defendant received the maximum sentence — fifteen to twenty years. See *supra* notes 31-32 and accompanying text for a brief discussion of this case. Grimshaw had a clemency hearing in Massachusetts in December; no decision has been made as of publication. Telephone Interview with Stan Grossfeld, reporter, *The Boston Globe* (Dec. 19, 1992).

Women's bails also tend to be high, even though they are unlikely to commit new crimes or leave the area, and they seldom have a criminal record. See HLS MANUAL, *supra* note 43, at 23 (citing Sarah Buel, *An Integrated Response to Family Violence: Effective Intervention by Criminal and Civil Justice Systems* (1990), in HARVARD LAW SCHOOL BATTERED WOMEN'S ADVOCACY PROJECT TRAINING AND RESOURCE MANUAL 61 (1991)). Notable is the case of Gladys Gonzales, *supra* note 14 and accompanying text. Despite having no prior arrests and having two children and her family in the area, she was held on bail for fourteen months and eventually sentenced to forty years in prison, the stiffest sentence for murder in Illinois. Gonzales petition, *supra* note 14. She subsequently received a grant of clemency from Illinois Governor James Thompson. *Id.*

A possible explanation for stiff sentences may be a planned nature of a killing (both Grimshaw and Gonzales recruited others to assist them) or the use of a weapon against a man armed with his fists but without what a court would usually define as a deadly weapon. See Kathy Fair, *Equal Rights a 2-Edged Sword for Female Cons*, HOUSTON CHRON., May 7, 1989, at 36-A (quoting captain Janice Wilson in Gatesville, Tex., who asserts that the disparity may arise because a woman almost

be undertaken in California to determine if there is disparate sentencing between men and women prisoners, particularly in cases in which the defendant stood accused of killing a lover or spouse. It is a just use of the executive clemency power to adjust disproportionate sentences; remitting or reducing the sentences to an equal level would both make a strong statement and be consistent with retributive theory.²⁹²

2. *A Utilitarian Analysis*

Utilitarians argue that the business of government is to promote the happiness of society, which it does by outlawing actions that cause harm.²⁹³ In reforming or disabling criminals, the state provides for the security and happiness of its citizens²⁹⁴ and deters other criminal, thus preventing more unhappiness (to society) than it causes (to the incarcerated criminal).²⁹⁵ Generally, the utilitarian weighs only the gain to society of punishing the individual. Concerns of desert are irrelevant, and punishment is not justified merely because a person has committed a crime.

Moore states that a strict utilitarian theory, such as Jeremy Bentham's, would prohibit the exercise of pardon in a utilitarian system of justice. Utilitarians believe that a legal system should not make exceptions to rules, for in the consistent application of punishment lies the benefit to society of general deterrence.²⁹⁶ However, some utilitarians have argued that additional utilitarian considerations should serve to rebut the *prima facie* obligation to punish that arises from conviction itself.²⁹⁷

Yet even Bentham considered factors that would justify the use of the clemency power "where punishment does more harm than good."²⁹⁸

always uses a knife or gun, where a man may use only his hands). *But see* Grossfeld, *supra* note 32. He reported on the case of P.E. Allen, a woman serving eight to fifteen years for manslaughter for killing her boyfriend with a curling iron as her attacked her. *Id.* He beat her and threatened to throw her television on her. He then stormed out and waited by the front door. She made herself busy, curling her hair. When he came back to the apartment, he assaulted her again. She spun around and stabbed him six times with a sharp-ended hair iron. Telephone Interview with Stan Grossfeld, reporter, *The Boston Globe* (Dec. 19, 1992) (recounting a personal interview with Allen).

292. *See* Kobil, *Mercy Strained*, *supra* note 3, at 628 (noting that former California Governor Pat Brown considered equality of sentences the most important factor in clemency decisions, although no systematic review of sentencing was undertaken during his administration).

293. MOORE, *supra* note 247, at 36.

294. *Id.*

295. *Id.*

296. *Id.* at 38-39.

297. *Id.* at 39-40 (quoting S.I. Benn, a twentieth-century utilitarian, who argued that the obligation should be "defeated" by other utilitarian considerations).

298. *Id.* at 41.

Those situations include: where punishment would not be effective in deterring crimes, such as when a person is incapacitated; where punishment is excessive because no harm has occurred, a greater harm was avoided, or the harm can be fully repaired; where punishment is needless, such as where education would prevent further crimes; and where punishment would cause harm greater than the harm of not punishing.²⁹⁹ As Moore put it, "For Utilitarians, the punishment does not have to fit the crime, nor does it have to fit the criminal. The punishment must fit only the needs of society."³⁰⁰ For many of the reasons discussed in the last section, battered women should be granted clemency from a utilitarian perspective.

(a) Deterrence

Incarceration of battered women probably serves only the goal of specific deterrence. Even then the effectiveness of incarceration as opposed to other means of intervention is questionable. Most of these women are first offenders who killed in desperate attempts to save their lives. They are not marauding, cold-blooded killers and rapists likely to "attack" again. Further, a condition of clemency could be the requirement that a formerly battered woman participate in group and individual counseling or perform community service at a battered woman's center, both of which are likely to result in a formerly battered woman gaining the support and education she needs to be able to prevent future battering relationships. This less-expensive "diversion" program would probably be as effective in deterring future killings of abusive men as is incarceration.

(b) Greater harm avoided

A killer does not deserve punishment in a utilitarian model of justice when a harm greater to society has been avoided as a result of the killing. In deciding what the greater harm is, we must identify the criteria by which we will measure that harm. A proper utilitarian would exclude all moral considerations and considerations of desert, yet purely economic considerations are insufficient.³⁰¹ The greater-harm inquiry should focus

299. *Id.* at 40-41.

300. *Id.* at 41.

301. For instance, it is possible to weigh the intellectual or economic productivity of the deceased against that of the survivor and conclude that society would have been better off economically had the abuser survived (if he is a wage-earner, important scientist, or philanthropist) rather than the defendant (if she is unemployed, untrained, uneducated, or on public assistance). On the other hand, we may decide that it is more harmful to society if the abuser vanquishes (if he is marginally productive, or uneducated, or on public assistance) than if the victim died (having been a successful and productive member of society, now leaving two children wards of the state).

on the happiness or peace of mind that results from the knowledge that rational acts will be given the protection of law.

It is a greater harm that an innocent recipient of cruel or violent abuse should die because she takes such abuse without fighting back than that a cruel abuser should die because the victim defended herself. Utilitarians are concerned with the happiness of the citizens of the state. That happiness may come from the knowledge that the law will protect them when they act reasonably in self-defense. The legal construct of self-defense as a matter of law reflects this utilitarian value.³⁰² This justification entails a value judgment as to which harm is greater, but to favor the innocent victim over the the batterer is not an unprincipled judgment.

(c) Needless punishment

The punishment in many battered women's cases may be too severe.³⁰³ Many women who kill partners do so only after long histories of violent abuse. We can prevent a greater harm to society through intervention and education without requiring punishment that is expensive and removes a woman from her family and from the opportunity to be a productive member of society.

(d) Punishment causes greater harm

Incarcerating women who have already suffered causes greater harm to society than placing them in alternative programs, such as diversion, community service, or counseling programs. Women who are imprisoned are separated from their children, with all the attendant social costs of separation. That is, children lose the guidance and love of their mothers and perceive them as criminals against society. If they have no other family members, they may need to be placed with state agencies, burdening society economically and the children psychologically. In addition, incarceration removes from society a potential worker (whether in the workforce or raising children at home) who otherwise would have added to overall productivity. Instead, the taxpayer pays more than twenty thousand dollars per year to keep her in prison.³⁰⁴

All these factors strengthen the retributive justifications and indicate that for the benefit of society battered women in prison who pose no

302. See Rosen, *supra* note 74, at 27 (the encouragement of intentional homicides in self-defense reflects the view that such killings are not harmful to society and may be beneficial).

303. See *supra* note 291.

304. See Ways and Means Committee Analysis, fiscal predictions, hearing on AB 2373 (as amended Mar. 12, 1992) (Apr. 8, 1992). See *infra* notes 398-410 and accompanying text (discussion of AB 2373, the clemency commission legislation).

further risk to society can be set free consistent with notions of justice and fairness.

B. THE ORIGIN AND NATURE OF THE CLEMENCY POWER³⁰⁵

Clemency is generally defined as "kindness, mercy, forgiveness, leniency; usually relating to criminal acts."³⁰⁶ Although clemency includes the power to grant reprieves³⁰⁷ and amnesty,³⁰⁸ clemency is usually extended to convicted individuals in the form of a pardon or commutation of sentence. A pardon is an executive action that mitigates or sets aside punishment for a crime, releases an offender from entire punishment, and reinstates her civil liberties.³⁰⁹ Commutation,³¹⁰ in the criminal law context, is the shortening of a sentence to time served or the substitution of a jail term for a death sentence in a capital case. It does not relieve the offender of liability or reinstate her civil rights.

The ability of rulers to pardon was reflected in the earliest legal codes,³¹¹ in the Bible,³¹² and in Roman law and the early common

305. A full discussion of the historical development of clemency is beyond the scope of this article; for a thorough and engaging treatment of the uses and abuses of the executive power, including its ancient roots and historical uses, see Kobil, *Mercy Strained*, *supra* note 3, and sources cited therein.

306. The term is often used to describe the acts of a governor of a state when he or she commutes a death sentence to life imprisonment or grants a pardon. BLACK'S LAW DICTIONARY 252 (6th ed. 1990). Clemency is also generally defined as "mildness or gentleness of temper, as shown in the exercise of authority or power; mercy, leniency." OXFORD ENGLISH DICTIONARY 309 (2d ed. 1989). Often the term pardon is used in a general sense, meaning all acts of clemency, including pardon, commutation, reprieve, amnesty, and a fifth category, remission of fines. See Kobil, *Do the Paperwork*, *supra* note 248, at 660.

307. A reprieve is a temporary relief from or postponement of execution of criminal punishment or sentence (a stay). BLACK'S LAW DICTIONARY, *supra* note 306, at 1302.

308. Amnesty is defined as "a sovereign act of forgiveness for past acts, granted by a government to all persons (or to certain classes of persons) who have been guilty of crime . . . generally political offenses . . . often conditioned upon their return to obedience and duty within a prescribed time." *Id.* at 82-83. See also *Burdick v. United States*, 236 U.S. 79 (1915) (amnesty is usually bestowed upon those convicted of political offenses); *Knote v. United States*, 95 U.S. 149, 152 (1877) (amnesty is forgetfulness; pardon is forgiveness).

309. BLACK'S LAW DICTIONARY, *supra* note 306, at 1113 (citing *Verneco, Inc. v. Fidelity & Cas. Co. of N.Y.*, 219 So. 2d 508 (La. 1969) and *State ex rel. Herman v. Powell*, 367 P.2d 553 (Mont. 1961)).

310. Commutation is "an alteration, a change, or a substitution; the act of substituting one thing for another." *Id.* at 280.

311. It was reflected in one of the earliest written legal codes, the ancient Babylonian law, the Code of Hammurabi, written no later than the seventeenth century B.C. HANS JOCHEN BOECKER, *LAW AND THE ADMINISTRATION OF JUSTICE IN THE OLD TESTAMENT AND ANCIENT EAST* 68, 106-07 (1980) (if a husband forgave and pardoned his wife for adultery, the king could pardon his subject, the man who committed adultery with the wife; otherwise, the two adulterers were bound and thrown into the river).

312. Cain slew Abel, and was banished, but through the mercy of God was spared

law of England, when more than 200 offenses carried the penalty of death.³¹³ During this time, the ability to pardon was seen as an intense source of political and financial power.³¹⁴ By the end of the Enlightenment, abuse of the pardoning power had serious consequences.³¹⁵ Eighteenth-century philosophers rebelled against the unprincipled, arbitrary, and corrupt use of clemency,³¹⁶ which overwhelmingly was granted not on considerations of fairness and mercy but instead for political, personal, and financial gain.

Kobil noted that many clemencies of early United States presidents were granted to benefit the public or "serve the public good."³¹⁷ Yet in the contemporary United States, vestiges of the historically arbitrary, corrupt, and political nature of clemency persist. For instance, in political campaigns office-seekers have made promises to release or not release certain individuals, thus serving themselves rather than the public good.³¹⁸

At the beginning of the 1992 presidential campaign, Arkansas Governor Bill Clinton rejected the clemency bid of Ricky Rector, a brain-damaged murderer on death row in Arkansas.³¹⁹ Rector shot a police officer and then shot himself in the head, resulting in severe brain damage after a prefrontal lobotomy.³²⁰ Clinton denied clemency to Rector

his life. Genesis 4:8-16 (King James). Barrabas, a convicted murderer, was set free to the Jewish people during Passover. John 18:38-40 (King James).

313. MOORE, *supra* note 247, at 14-17; Kobil, *Mercy Strained*, *supra* note 3, at 585-89.

314. MOORE, *supra* note 247, at 17-19 (noting that although pardons were "freely given," they were not given for free). See also Kobil, *Mercy Strained*, *supra* note 3, at 588.

315. The Reformation was largely spurred by the papal sale of indulgences, and in England a political struggle raged for centuries over the right to exercise the pardoning power. MOORE, *supra* note 247, at 22.

316. Montesquieu argued that in a republic there could be no pardon, because the "power to punish rested with the people, and a pardon would unjustifiably tamper with their decisions." *Id.* at 24 (citing CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF LAWS* (1900)). Blackstone argued there was no place in a democracy for pardons; and they were abolished in France during the French Revolution and for ten years afterward. *Id.*

317. Kobil, *Mercy Strained*, *supra* note 3, at 592-93 (citing cases of large pardons related to the Pennsylvania whiskey rebellion and under the Alien and Sedition Act).

318. See *id.* at 573 (citing 20/20: *Why Not Wilber Rideau?* (ABC television broadcast, Apr. 14, 1989) (discussing former Louisiana Governor Edwin Edwards' refusal to release a rehabilitated prisoner because of a campaign promise to a victim of the incarcerated man)).

319. Clinton: "There Might Be More Executions If Elected," UPI, Mar. 29, 1992, available in LEXIS, Nexis library, UPI file.

320. Linda Diebel, *Admirers Say He's "Very Bright," the Right Man for the Times. Critics Call Him "Slick Willy," the Consummate Yuppie. But Why, When He's On the Verge of Becoming U.S. President, Are People Still Wondering: Who is Bill Clinton?*,

because he believed that the prisoner did not fall below the federal standard for mental incompetence.³²¹ The denial was controversial, and Rector's lawyers asserted the prisoner had the mental capacity of a "drugged up three- or four-year old."³²² Clinton has long stated that he personally supports the death penalty for "cop killers, multiple murderers and drug kingpins" and has never commuted the sentence of a murderer on death row.³²³ It is impossible to know whether he would have commuted the death sentence of Rector if he had not been vulnerable to attacks by Republicans during the campaign. He has reportedly stated that his stand on the death penalty will "pre-empt the type of Republican attacks that weighed down the campaign of [former Democratic presidential candidates]."³²⁴ Clinton has commuted the life sentences of more than forty murderers not on death row,³²⁵ and it has been noted that his use of the clemency power has fluctuated with his political losses. It is believed that he lost his initial re-election bid for governor of Arkansas in part because of his failure to set death sentence dates quickly enough to allow executions to proceed, as well as for his commutation of the numerous life sentences.³²⁶ After Clinton won re-election the following term, he granted clemency rarely and expeditiously set execution dates.³²⁷ After former President George Bush lost his re-election bid, several Republican politicians urged him to pardon all Iran-Contra suspects, a position unthinkable a mere week earlier.³²⁸ And in December

TORONTO STAR, Oct. 25, 1992, at F1.

321. See George E. Jordan, *Clinton & Crime: Supports Capital Punishment as Sign of Toughness*, NEWSDAY, May 4, 1992, at 3.

322. Diebel, *supra* note 320.

323. Jordan, *supra* note 321 (Clinton has never granted a petition for clemency for a murderer sentenced to death); Tamar Lewin, *Vast Discretion for Governors in Decision on Death Penalty*, N.Y. TIMES, May 20, 1992, at A14 (stating Clinton maintains he is personally in favor of the death penalty); *Convicted Cop Killer Executed After Governor Bill Clinton Denies Clemency*, AGENCE FRANCE PRESSE, May 8, 1992, available in LEXIS, Nexis library, Omni file; *Executed in Arkansas*, WASH. TIMES, May 9, 1992, at A2. But see Leslie Phillips, *Adwatch*, USA TODAY, Oct. 8, 1992, at 11A (asserting that Clinton commuted seventy death sentences, including nineteen "midnight clemencies" at the end of his first term as a "lame duck" governor).

324. Jordan, *supra* note 321.

325. *Id.*

326. *Id.*

327. *Id.* Of course, it is entirely consistent to view a political loss as a referendum on unpopular aspects of an elected official's term, and Governor Clinton may well have changed his outlook and behavior in response to unfavorable public sentiment regarding his former policy of inaction.

328. See *Dole Wants Probe of Prosecutor Walsh; He Calls Weinberger Indictment a Demo Ploy*, S.F. CHRON., Nov. 9, 1992, at A3 (Senate minority leader Robert Dole (R-Kansas) called on former President Bush to pardon all those involved in the Iran-Contra scandals, including former Reagan administration Defense Secretary Caspar Weinberger).

of 1992, Bush pardoned not only his former defense secretary, Caspar Weinburger, but also five others involved in wrongdoing connected with the Iran-Contra scandal.³²⁹ In California, former Governor Edmund (Pat) Brown once refused the clemency bid of a murderer he was convinced had mental deficiencies because a key supporter of a piece of legislation on migrant workers, who held the swing vote that could have killed the legislation, strongly supported the execution.³³⁰

Arbitrary, politically motivated, or politically expedient uses of the clemency power seem unfair; they also do not promote justice within our criminal justice system. There are philosophical and theoretical reasons for this perception of unfairness,³³¹ but more simply, most ordinary people probably believe that a review of one's sentence should be based on considerations of fairness and justice, rather than political expediency. When granted only for the benefit of the individual prisoner and for the benefit of the executive as politician, there is no consideration of justice or benefit to society, thus offending both retributive and utilitarian concerns.

Even though the clemency power has arguably been used arbitrarily and without much concern for justice or the common good,³³² it has remained in the sole discretion of the executive in almost every jurisdiction. Accountability comes only through the ballot box.³³³ The Supreme Court has declined to hold that the discretion inherent in executive clemency is unconstitutionally arbitrary,³³⁴ at least in the context of capital

329. David Johnston, *The Pardons; Bush Pardons 6 in Iran-Contra Affair, Aborting a Weinberger Trial; Prosecutor Assails "Cover-Up,"* N.Y. TIMES, Dec. 25, 1992, at 1A.

330. See Kobil, *Mercy Strained*, *supra* note 3, at 608.

331.

Calculations of advantage to be gained — the pardoner's advantage or the offender's, advantages for society in general or for a political party in particular — are not good reasons [for pardoning] They invite the [executive] to use an offender as a pawn in a game not of the offender's own choosing. They lead to inequity between offenders. They frustrate the justice system's already flawed effort to match punishment with blameworthiness. And they . . . [allow] an offender to leave his debt to society unpaid.

MOORE, *supra* note 247, at 226-27.

332. For a host of examples, see Kobil, *Mercy Strained*, *supra* note 3.

333. The clemency power has been so delegated except for a brief period in the early days of the United States, when early settlers vested the power in the state legislatures or in a legislative council that worked with the governor. See Kobil, *Mercy Strained*, *supra* note 3, at 590, 604. However, the framers of the Constitution vested the federal clemency power solely in the executive. Susan E. Martin, *Commutation of Prison Sentences: Practice, Promise, and Limitation*, 29 CRIME & DELINQUENCY 593, 593-94 (1983).

334. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (plurality opinion). See Note, A

cases on petition for clemency. Thus, it seems clear from a constitutional and traditional perspective that the final decision of a governor in granting or denying clemency petitions is not subject to collateral attack on due process grounds and is therefore final and non-reviewable. In addition, the express delegation of the power to the executive seems to resolve any separation-of-powers problem in favor of the governor should the legislature attempt to provide for solutions that significantly restrict the governor's discretion or mandate clemency in particular cases or situations.

The power of clemency in the federal and state governments resides primarily in the executive.³³⁵ In California, the clemency power is vested in the governor by the constitution³³⁶ and procedures are set forth by statute.³³⁷ The California Constitution explicitly allows the governor, in

Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings, 90 YALE L.J. 889, 890 n.5 (1981) [hereinafter Note, *Due Process Protection*] (Gregg leaves unchanged the uncertain constitutional status of state clemency provisions not surrounded by due process protection). See also *Rose v. Hodges*, 423 U.S. 19 (1975) (state prisoner's Eighth and Fourteenth Amendment rights not violated when a governor commutes a death sentence to ninety-nine years in prison, despite state appellate court's vacating death sentence, effectively resulting in a term of life imprisonment).

335. The "Power to grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment," is vested in the President of the United States. U.S. CONST. art. II, § 2, cl. 1. In twenty-nine states, the power is vested solely in the executive, usually by state constitution. In the remaining states, the power is exercised either jointly by the governor and an administrative body or solely by an administrative body appointed by the governor. See Kobil, *Mercy Strained*, *supra* note 3, at 605.

336. CAL. CONST. art. V, § 8.

337. Under California law, the Board of Prison Terms has long been authorized to report to the governor

from time to time the names of any and all persons imprisoned in any state prison who, in its judgment, ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause which, in their opinion, should entitle the prisoner to a pardon or commutation of sentence.

CAL. PENAL CODE § 4801 (West 1982). See *infra* notes 371-72 and accompanying text for discussion of language recently added that specifically authorizes the Board of Prison Terms to consider "battered woman syndrome" in its recommendations for clemency.

Penal Code section 4804 mandates that "[a]t least 10 days before the Governor acts upon an application for a pardon, written notice . . . must be served upon the district attorney of the county in which the conviction was had," and section 4806 excuses such notice in cases of impending death or imminent release.

Under the Constitution and the Penal Code, the governor must report to the legislature each reprieve, pardon, and commutation granted, stating the pertinent facts and the reasons for granting it. In addition, he may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, four justices concurring. In the case of commutation, the governor must provide the name, sentence, date, reason for conviction, and reason for granting commu-

the exercise of the power, to set "conditions the Governor deems proper."³³⁸ Some state governors have issued detailed information and guidelines setting forth the factors that influence and guide their decisions.³³⁹ Governor Wilson has issued no such guidelines. However, his response to the battered women who petitioned him³⁴⁰ provides some information on his views. In contrast to the view of Massachusetts Governor William Weld, whose guidelines provide that "the Governor views commutation both as an extraordinary remedy and as an integral part of the correctional process,"³⁴¹ Governor Wilson has stated that he views clemency as a "rare and extraordinary" remedy based on "extreme and unusual hardship or innocence."³⁴² Governor Wilson's letter indicates

tation. CAL. CONST. art. V, §8; CAL. PENAL CODE § 4807 (West 1982).

338. CAL. CONST. art. V, § 8(a) provides: "Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in cases of impeachment."

339. Massachusetts Governor William Weld has provided the following general information:

The Governor views commutation both as an extraordinary remedy and as an integral part of the corrections process. [Its] availability . . . is not intended to serve as a review of the proceedings of the trial court or of the guilt or innocence of the petitioner. It is intended to serve as a strong motivation for confined persons to utilize available resources for self-development and self-improvement and as an incentive for them to become law-abiding citizens and return to society.

WILLIAM F. WELD, COMMUTATION GUIDELINES AND PETITION 1 (Sept. 1991) [hereinafter WELD GUIDELINES] (on file with author).

In order to guide the Advisory Board of Pardons in its review and recommendations on petitions for clemency, Weld established a "uniform policy." It provides, in relevant part, that a petitioner has the burden of demonstrating by clear and convincing evidence that she has made "exceptional strides" in self-development and self-improvement and would be a law-abiding citizen. The petitioner may also show that she is suffering from a critical illness, that she has a severe and chronic disability, or that her continued incarceration would constitute gross unfairness because of the basic equities involved. Such basic inequities include a history of abuse suffered by the petitioner at the hands of the victim that significantly contributed to or brought about the offense. The guidelines also contain extensive requirements for notice (to district attorneys, victims, and their families), including a public notice requirement, and a list of required documentation. *Id.*

340. Wilson Letter, *supra* note 6.

341. *Id.*

342. The letter reads, in relevant part:

All . . . requests [for commutation] are referred to the Board of Prison Terms for investigation . . . based solely on the written record . . . augmented by materials submitted by the applicant

. . .

Since you allege your crime was the result of spousal abuse, it is important . . . to indicate how or if this information was presented at your criminal trial; whether it was raised on appeal; any facts mitigating your commitment offense; and, information concerning any

that he does not view the clemency power as a tool for adjusting sentences to comport with desert or with society's interests in justice. The power has been used only twice in California since 1978.³⁴³

However, the clemency power can also be used to correct unjust results in our criminal justice system.³⁴⁴ In battered women's cases — cases in which social, legal, and political factors strongly influence the trials and verdicts — the clemency power serves as a necessary and powerful tool for ensuring that justice is done.

C. POLITICAL CONSIDERATIONS IN BATTERED WOMEN'S CASES

Clemency is inherently political.³⁴⁵ Yet it is also a personal decision. A governor acts based on all his or her beliefs and values in determining whether clemency should be granted. Governor Celeste of Ohio had been a longtime advocate for the rights of battered women, turning his Cleveland home into a battered women's shelter when he moved to Columbus to become governor in the mid-1970s.³⁴⁶ In granting clemency, Celeste doubted that the women would pose a continuing threat to society, and he cited previous abuse as a reason for granting clemency. He initiated the case reviews himself, directing his aides "to review the records of women convicted of violent crimes against spouses or companions that may have been brought on by physical abuse."³⁴⁷

Ann Richards, the governor of Texas, recently signed two items of

rehabilitative efforts in prison

Normally, our office does not consider applications for executive clemency for individuals currently under sentence except on grounds of either extreme and unusual hardship or innocence . . . [and] only in rare and extraordinary cases does a Governor commute a sentence, and then usually upon the favorable recommendation of the Board of Prison Terms, the District Attorney and the sentencing judge.

Id. at 1-2.

343. *See id.* at 2 (stating that the power has been used only once since 1978 — in a case of innocence). However, in the spring of 1992, Governor Wilson commuted the sentence of Birdie Foley, a battered woman incarcerated for killing her abuser. Foley (represented by one of the Coalition advocates) had cancer of the esophagus and died two days later. Barbieri, *Mixed Victory*, *supra* note 54. Although the governor issued no reason for the grant, it is believed that this was an isolated instance, in keeping with the governor's policy of granting commutation in cases "of extreme and unusual hardship." *See id.*; Wilson Letter, *supra* note 6, at 1 (standard quoted from governor's letter to petitioners).

344. *See* Kobil, *Mercy Strained*, *supra* note 3, at 571 (clemency individualizes sentences and remits undeserved punishment).

345. Note, *Due Process Protection*, *supra* note 334, at 893-94 (clemency addresses factors that courts are unable to consider in setting or reviewing sentences).

346. Wilkerson, *Clemency Granted to 25*, *supra* note 9.

347. *Id.*

legislation, one of which is the "Texas Resolution," which requested the governor to use her authority to direct the Texas Board of Pardons and Paroles to investigate the cases of "all persons convicted [of crimes] which directly related to victimization by domestic violence."³⁴⁸ The Resolution and the second bill — an evidentiary bill providing for the admissibility of battered woman syndrome expert opinion testimony at trial — had been passed earlier but were vetoed by then-Governor Bill Clements in 1989. When they came before Richards two years later she signed them, calling the laws "a great step forward."³⁴⁹

The influence of personal beliefs and the existence of a sympathetic executive can account for such a switch in executive policy as occurred in Texas. But a sympathetic executive acting on personal beliefs can engender a political backlash as well. Governor Celeste was on his way out of office when he granted clemency to the battered women in Ohio. He was modestly rebuked for granting clemency in these cases.³⁵⁰ However, on January 10, 1991, four days before leaving office, he granted clemency to eight people on death row, including all four women on death row.³⁵¹ The ensuing flurry of criticism was unprecedented. The new governor, George Voinovich, a supporter of capital punishment, immediately requested the newly elected Ohio attorney general, Lee Fisher, to "undo" the grants of clemency.³⁵² Fisher challenged seven of the death penalty clemencies, along with four grants of clemency in non-capital cases, in court on the ground that Governor Celeste failed to follow

348. Texas Concurrent Resolution 26, S.C.R. No. 26 (Apr. 26, 1991); Mark Langford, *Resolution Calls for Review of Murder Cases Involving Battered Spouses*, UPI, Mar. 11, 1991, available in LEXIS, Nexis file, UPI library. See also *infra* notes 396-405 and accompanying text for discussion of similar California proposal.

349. *Clemency Update*, DOUBLE-TIME, *supra* note 14, at 5.

350. Celeste was criticized by the media and prosecutors, many of whom claimed that the women were never abused or denied being abuse. See Kobil, *Do the Paperwork*, *supra* note 248, at 679-80. See also Tim Doulin and Jill Riepenhoff, *Clemency Decision Stirs Controversy*, COL. DISP., Dec. 23, 1990, at 1A; *Mother Blasts Celeste for Freeing Son's Killer*, UPI, Dec. 25, 1990, available in LEXIS, Nexis library, UPI file.

351. Kobil, *Do the Paperwork*, *supra* note 248, at 679-80. Although 105 prisoners were on death row, Celeste commuted the sentences of only eight, and six of those sentences were commuted to life in prison without possibility of parole. *Id.* at 680. In addition, he appeared to have used what Kobil would call "justice-enhancing" criteria in arriving at his decisions. He considered the mental capacity of the offender, length of time served, and the "perceived racial imbalance on Death Row." *Id.* Nevertheless, critics called the clemencies a "rupture of Ohio's system of justice." *Id.* at 683 (citing *Killers Spared*, COLUMBUS DISP., Jan. 14, 1991, at 8A). Celeste appears to have granted fewer clemencies to convicted murderers in his two terms than either of the prior two Ohio governors.

352. *Id.* at 681.

statutory notice requirements.³⁵³ Those notice requirements were drafted by the legislature under its authority to make provisions regarding the application for clemencies, as stated in the Ohio Constitution.³⁵⁴ Fisher won at trial and the grants of clemency were reversed.³⁵⁵ The case is now on appeal and will almost certainly be appealed to the Ohio Supreme Court.³⁵⁶ Although it was the death penalty cases and not the battered women's clemencies that were attacked, such political maneuvering is certainly foreseeable in battered women's mass clemencies.³⁵⁷

Other than such constitutional and statutory wrangling (which will be rare if the executive is cautious in his or her "excesses"), the only check on the exercise of the clemency power is electoral accountability.³⁵⁸ Such accountability may be achieved directly by the public in the form of ouster by election or through the public's representatives, who may impeach for specific abuses. The statutory and constitutional provisions in California regarding clemency grant substantial discretion to the governor. The power is not limited by burdensome notice requirements or the requirement that a prisoner serve a minimum number of years of his or her sentence before applying. As a result, Governor Wilson would not likely experience attack by fellow politicians, especially since the clemency bid is supported generally by many assembly members.³⁵⁹ He needs to worry only about a public backlash that would endanger his chances for reelection. Such ouster for what the public believes is an abuse of the clemency power is not unprecedented. Governors have been impeached and indicted for corrupt pardoning practices,³⁶⁰ and they have lost reelection bids for making unpopular clemency grants that were fully jus-

353. *Id.* at 681, 686-87.

354. *See id.* at 686-89. *But see* MOORE, *supra* note 247, at 244 (noting that both Presidents Ford (in the Nixon pardon) and Reagan (when he pardoned FBI agents) failed to wait the required statutory minimum number of years before pardoning some prisoners during their presidencies).

355. *See Attorney General Applauds Decision on Commutations*, UPI, Feb. 13, 1992, available in LEXIS, Nexis library, UPI file.

356. Telephone Interview with Daniel Kobil, assistant professor of law, Capital University Law School (Dec. 1, 1992).

357. Although Governor Schaefer of Maryland was roundly criticized at the time of the clemencies, there has been no known organized opposition against him arising out of the grants. Telephone Interview with news desk reporter at *The Baltimore Sun* (Nov. 11, 1992).

358. Note, *Due Process Protection*, *supra* note 334, at 894-95 and sources cited therein.

359. *See supra* notes 55-63 and accompanying text, and *infra* notes 371-72, 378-79, and 385-88 and accompanying text for discussion of the legislature's response to the clemency bid.

360. *See* Kobil, *Mercy Strained*, *supra* note 3, at 607 (discussing the impeachment of Oklahoma Governor J.C. Walton in 1923 and the indictment of Tennessee Governor Ray Blanton in the 1980s).

tified.³⁶¹ Such political considerations could hamper the desire to grant clemency petitions. Indeed, California governors have done so rarely.

Two institutions in society are potential sources of opposition to grants of mass clemency: district attorneys³⁶² and the media.³⁶³ In California, Michael Sweet, the executive director of the California District Attorneys Association, says that prosecutors would probably oppose a "movement" for clemency in battered women's cases, but they would probably not oppose individual grants of clemency after going "into the facts and circumstances of each case."³⁶⁴ Prosecutors also assailed the granting of clemency en masse in Ohio and Maryland, voicing the concern that women now had a "license to kill."³⁶⁵ However, at least one district attorney has expressed support for making commutation available to women who did not have the opportunity to present evidence of abuse at trial.³⁶⁶

The media reaction is also difficult to gauge. According to Governor Celeste of Ohio, backlash is inevitable, and the negative reaction to a grant of clemency to battered women in Maryland could have been predicted.³⁶⁷ The backlash may come in the form of negative press cover-

361. See *id.* (discussing failed re-election bids of former Illinois Governor John Altgeld, who pardoned wrongly convicted anarchists in the Chicago Haymarket labor bombing, and Ohio Governor Michael DiSalle, who commuted the death sentences of six individuals in the early 1960s). Although the justification of the pardon is debated, President Ford may have lost his re-election race against Jimmy Carter because of his pardon of Nixon.

362. See *supra* notes 4, 154-64 and accompanying text.

363. See Baum, *Backlash*, *supra* note 7 (describing the "political pounding" Governor Schaefer of Maryland absorbed since granting eight battered women clemency; allegations came from the media, prosecutors, and a formerly battered ex-wife of one of the victims. They accused the governor of doing a "sloppy job," although governor's aide says the media didn't know all the facts). See also *supra* note 53.

364. Barbieri, *Women's Movement*, *supra* note 46. See also Barbieri, *Push for Clemency*, *supra* note 15.

365. See *Many Battered Women; Ohio Governor Spares Convicted Murderers*, SEATTLE TIMES, Jan. 12, 1991, at A15. See also *supra* notes 4, 155 (Ohio Prosecuting Attorneys' Association president, among others, fears women will now kill more instead of seeking divorce).

366. Middlesex County district attorney Thomas Reilly welcomed Massachusetts Governor William Weld's alteration of his office's guidelines as they relate to battered women, *supra* note 339. Weld issued the new guidelines, saying they are a "recognition of the tragedy of the physical abuse of women which results in the homicide of a woman nearly every 22 days in Massachusetts." Frank Phillips, *Weld Relaxes Prison Appeal By Battered Women*, BOSTON GLOBE, Sept. 27, 1991, at 17. See also Susan Diesenhouse, *Women Driven to Kill Are Shown More Mercy*, N.Y. TIMES, Jan. 30, 1989, at A10 (reporting that the prosecutor in Kathleen Kaplan's case, see *supra* note 14, believes it is "appropriate to look at the circumstances that drive her to the crime").

367. Phillips, *Weld Relaxes Prison Appeal*, *supra* note 366.

age, such as that endured by Maryland Governor William Schaefer.³⁶⁸ To date, the California petitioners have garnered much positive media coverage, and there appears to be no vocal media opposition.

D. THE GOVERNOR'S OPTIONS

Governor Wilson should recognize that clemency, "properly exercised and freed of political pressures, represents an ideal vehicle for remedying many of the problems inherent in [our] system of criminal justice."³⁶⁹ Although the executive branch may well be "the most logical choice to pursue refinement of the clemency power,"³⁷⁰ Governor Wilson can and should share the political burden and risk of clemency decisions with the California Legislature and the Board of Prison Terms. This section describes some proposed legislation and makes recommendations regarding the legislation and other possible solutions. Governor Wilson has been responsive to legislation that aids battered women. However, he has resisted some important language changes contained in evidentiary bills and has resisted any change in the distribution of responsibility and power in the clemency process.

1. *Board of Prison Terms*

Governor Wilson should give the Board of Prison Terms guidance as it begins to review battered women's cases with a view toward recommending that petitions filed on behalf of battered women be granted or denied. The Board is now authorized by statute to make clemency recommendations to the governor generally, and it may specifically recommend battered women's cases on account of battered woman syndrome.

(a) Authorization

Until recently, the Board of Prison Terms was authorized by Penal Code section 4801

to report from time to time the names of . . . persons imprisoned . . . who, in its judgment, ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause, which, in its opinion, should entitle the prisoner to a pardon or commutation of sentence.

The governor recently signed AB 3436, introduced by Assemblywoman Barbara Friedman (D-Los Angeles).³⁷¹ This bill explicitly includes

368. See *supra* notes 4, 53 and accompanying text.

369. See Kobil, *Mercy Strained*, *supra* note 3, at 613.

370. *Id.* at 622.

371. 1992 Cal ALS 1138, 1992 Cal AB 3436, stats. 1992 ch. 1138 (Deering's Adv.

battered woman syndrome as a cause the Board of Prison Terms may consider in determining that a prisoner is entitled to pardon or commutation of sentence. It amends Penal Code section 4801 to read, "... or any other cause, including battered woman syndrome, which, in its opinion, should entitle the prisoner to a pardon or commutation of sentence."³⁷²

The Board of Prison Terms had the authority to consider the equities of battered women's cases all along under the more general language of the original section. However, the new language is a significant addition to the code. It suggests that the condition of battered women goes to the sentence deserved. Thus, commutation is seen less as an act of "mercy" than an act that corrects a fundamental injustice.

The fact that the Board has been advised to take battered woman syndrome into account may be limiting, however. The Board must be trained to recognize the stereotypes suggested by battered woman syndrome³⁷³ and its insufficiencies, and should not be constrained to recommend clemency petitions only in paradigm cases. The Board should take into account the emotional, financial, and cultural reasons that may influence a battered woman's decision to stay. It should also be informed of theories that may explain her defensive act, such as the ability to rate violence or her perception that something in the threats or violence is different than before. It should not rely only on the psychological, or learned helplessness, aspect of battered woman syndrome.

In addition, the bill as originally proposed included broader language that also authorized the Board to consider *experiences of victims of domestic violence*. The language was dropped because of indications that the bill would not be signed if such "experiences" language were in the bill before the governor.³⁷⁴ It remains to be seen how the Board will define "battered woman syndrome" and whether it will limit its inquiry to evidence included in its definition of battered woman syndrome because the "experiences" language was not contained in the final bill.

On the other hand, the language does not necessarily constrain the Board. It may still go beyond a narrow definition of the battered woman syndrome in making clemency recommendations to the governor.³⁷⁵ In

Legis. Svc. 1992) (approved by the governor, Sept. 28, 1992).

372. *Id.*

373. See *supra* notes 212-13, 237-38, 378-79 and accompanying text for a discussion of stereotyping and see generally notes 204-46 for limitations of the battered woman syndrome.

374. Telephone Interview with John Young, administrative assistant to Assemblywoman Barbara Friedman (Dec. 1, 1992).

375. This may be one advantage to broad definitions of the battered woman syndrome, whose use was criticized *supra* notes 185-88 and accompanying text. However, I maintain that it is best to use the battered woman syndrome label to refer

California both the Evidence Code³⁷⁶ and case law³⁷⁷ have allowed a broad interpretation of battered woman syndrome. The absence of the "experiences" language does not mean that the Board cannot consider factors beyond the classic formulation of battered woman syndrome, as Penal Code section 4801 has never been an exhaustive list of the grounds upon which the Board may base its clemency recommendations. Although the new language purports to allow the Board to consider battered woman syndrome evidence, it could have done so before, and it is not now limited to considering only syndrome evidence in battered women's cases.

(b) Training

With this more specific authorization in the Penal Code must come increased guidance and training. A second bill affecting the Board of Prison Terms may help curb the tendency to overstress only the psychological aspects of the battered woman syndrome. Jackie Speier (D-So. San Francisco), head of the Assembly Women's Caucus, proposed, and the governor signed, a bill requiring all commissioners and deputy commissioners of the Board of Prison Terms to receive initial training on issues specific to domestic violence cases and battered woman syndrome. This training would be mandatory for "all commissioners and deputy commissioners who conduct hearings to consider the parole suitability of prisoners or the setting of a parole release date."³⁷⁸ It is not clear from the wording of the statute that this includes all Board members who would be reviewing or have authority to review the cases of battered women who have petitioned for clemency.³⁷⁹ If the legislation does not

specifically to the theory of learned helplessness and the cycle of violence as originally framed by Lenore Walker, *supra* notes 190-203. Battered women's advocates should then continue to address the need to include in court the *experiences* of victims of domestic violence and all *other* relevant evidence tending to explain a woman's actions (including expert testimony not relying on the Walker formulation of battered woman syndrome). They should do so by advocating further modifications of the Evidence and Penal Codes, and by continuing to press for appellate review of unfavorable decisions that rejected arguments to modify the substantive definitions of self-defense law.

376. See *supra* note 56 for the language of the Evidence Code provision defining battered woman syndrome for the purposes of admitting expert testimony in criminal cases.

377. See *People v. Day*, 2 Cal. App. 4th 405, 412-13 (1992) (accepting the contents of an affidavit as evidence describing battered woman syndrome, including descriptions of behavior that include the elements of battered woman syndrome as developed by Lenore Walker and including descriptions of behavior not contained in the Walker theory of battered woman syndrome).

378. 1992 Cal ALS 296, 1992 Cal AB 2401, Stats. 1992 ch. 296 (Deering's Adv. Legis. Svc. 1992) (approved by the governor, July 22, 1992).

379. The legislation does not clearly provide that all those reviewing clemency peti-

cover all persons who will review petitions for clemency submitted by or on behalf of battered women who killed, such legislation should be passed clearly mandating such training.

(c) Enabling guidelines

It is unclear whether the Board of Prison Terms has ever recommended that a battered woman's sentence be commuted for justice-enhancing reasons. In addition, only one commutation has been granted in California since 1978. The power is used little in California and only in cases of "extreme and unusual hardship or innocence."³⁸⁰ It is thus no surprise that the Board of Prison Terms is not aided by more specific guidelines. The battered woman syndrome amendment to Penal Code section 4801 is helpful, but more is needed.

In responding to the petitioners' letter, the governor stated, "Since you allege your crime was the result of spousal abuse, it is important . . . to indicate how or if this information was presented at your criminal trial; whether it was raised on appeal; any facts mitigating your commitment offense; and information concerning any rehabilitative efforts in prison."³⁸¹

Now that the Board is expressly authorized to consider the battered woman syndrome, the governor should give the Board more guidance in considering the factors he listed in his letter.³⁸² He should specify the level of importance to be attached to presenting the claim of battering at trial or on appeal. Relevant expert opinion testimony on battered woman syndrome is now admissible in all criminal trials by statute. It remains to be seen whether the inability to put syndrome evidence before the jury will be the most relevant question in recommending cases deserving of clemency, or even a major consideration. A woman may have had ineffective trial counsel,³⁸³ or the finder of fact may not consider the bat-

tions of battered women be trained in domestic violence issues and battered woman syndrome. See *id.* (mentioning only those who conduct hearings for the purpose of considering *parole suitability*). The digest of the bill states that the Board of Prison Terms consists of nine commissioners who set parole dates. *Id.* Such initial training for these nine would accomplish the desired goal of training those on the Board who would also decide clemency petitions. However, the Board is authorized to deputize others for the purpose of "hearing cases and making decisions." *Id.* Since the bill only mandates training for deputy commissioners who would consider parole suitability, deputy commissioners appointed only to review battered women's clemency petitions would not be required by law to receive the training.

380. See Wilson Letter, *supra* note 6.

381. *Id.*

382. See Wilson Letter, *supra* note 6.

383. Although the court in *People v. Day*, 2 Cal. App. 4th 405, 407 (1992), held that a trial attorney's failure to offer expert testimony on battered woman syndrome may be ineffective assistance of counsel, the court in *People v. Aris* held that a trial

tered woman syndrome a viable explanation for her behavior.³⁸⁴ Judges and juries continue to convict despite facts that strongly indicate that a "confrontation" was underway and despite the introduction of expert testimony on battered woman syndrome. Admissibility of such evidence and appellate review should not be litmus tests. In addition, a history of abuse should be considered a mitigating factor, and the governor should identify what "rehabilitation" means in the context of battered women who kill.

The exercise of the clemency power in battered women's cases must be ongoing. This clemency drive should not be seen as a "one-shot" effort designed only to compensate battered women now incarcerated for their inability to present battered woman syndrome evidence at their trials. Governor Wilson must give his Board more guidance and ensure that the Board is trained initially and continually on battered women's issues to guarantee the Board's effectiveness in recommending clemency petitions for battered women who kill.

2. *The California Legislature*

Assembly members have proposed legislation that would modify the substantive law of self-defense³⁸⁵ and that would further modify the evi-

court's exclusion of such testimony was harmless error. *People v. Aris*, 215 Cal. App. 3d 1178, 1199-1200 (1989). Both courts held that evidence of battered woman syndrome was irrelevant to the objective prong of perfect self-defense. *See supra* notes 109-112 and accompanying text. Thus, a battered woman who offers expert testimony on battered woman syndrome or introduces past history of violent abuse may still not get a perfect self-defense instruction, and a jury may reject even an imperfect self-defense claim.

384. *See, e.g., supra* note 238 (case holdings that prevented women from using the testimony because their actions kept them from being considered "good" battered women).

385. Assembly member Gwen Moore (D-Los Angeles) introduced AB 591 last year. The bill included a provision that would have amended the Penal Code to add a fourth definition under the offense of manslaughter. In addition to voluntary, involuntary, and vehicular manslaughter, the legislation proposed that manslaughter also be defined as "the unlawful killing of a human being when, at the time of the killing, the person who kills had an honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury." AB 591 (proposed, Feb. 19, 1991).

This bill did not make it through the legislature largely because of opposition by prosecutors, who recognized that the legislation would codify the California Supreme Court's decision in *People v. Flannel*, 25 Cal. 3d 668 (1979). In that case, the court held that an honest but unreasonable belief in the need for self-defense negates malice and reduces the offense to manslaughter. *Id.* at 674, 679. This principle is recognized in California as "imperfect" self-defense. *See People v. Aris*, 215 Cal. App. 3d 1178, 1186 (1989) (imperfect self-defense requires only subjective honesty and negates malice aforethought, reducing the homicide to voluntary manslaughter).

The legislation was introduced to preserve the *Flannel* decision. In 1991, the California Supreme Court ruled that California law will not allow a reduction of

dentiary rules regarding the admissibility at trial of battering evidence.³⁸⁶ In addition, bills that specifically authorize the consideration of battered woman syndrome in deciding clemency petitions and that provide training, both directed at the Board of Prison Terms, were passed in 1992.³⁸⁷ Finally, the head of the Assembly Public Safety Committee proposed legislation, discussed below, that would have removed the clemency decision process in battered women's cases to a special commission formed for the purpose of reviewing only battered women's cases.

(a) Proposals for review commissions

Assemblyman John Burton introduced, and Governor Wilson vetoed,

murder to nonstatutory voluntary manslaughter in cases of diminished capacity. *People v. Saille*, 54 Cal. 3d 1103, 1107 (1991). It stated in a footnote that "[the doctrine of imperfect self-defense] has no application to the facts before us, and we do not decide whether it has been affected by [California law abolishing diminished capacity and redefining malice aforethought]."

Prosecutors opposed the legislation; such opposition may have helped, rather than hurt, battered women. The principle of imperfect self-defense is an existing nonstatutory definition of manslaughter; even so, it is not a good idea to codify an offense under which a good-faith belief in the necessity of self-defense is an element of a crime. If and when the California Supreme Court determines that *no* nonstatutory definitions of manslaughter may exist under California law, the legislation would be necessary and appropriate. It may be better for battered women (or other victims of domestic violence) to have the benefit of a nonstatutory self-defense claim that is judge-made and may be judge-refined.

However, if the legislation must be passed, it would be more helpful to define "unreasonable" and to provide also that a jury may consider more individualized traits or special circumstances or knowledge in applying an objective reasonable person test to cases in which victims of domestic violence kill abusers. See Maguigan, *supra* note 69, at 410 (describing New York's two-pronged "objective" test, set out in *People v. Goetz*, 497 N.E.2d 41, 52 (N.Y. 1986), that allows a subjective appraisal of honest and actual belief and an objective appraisal by the jury of *whether a reasonable person in the same circumstances would have acted in the same manner*).

386. AB 591 would have amended Evidence Code section 1107 to allow the introduction of evidence of "experiences of victims [of] domestic violence" in addition to evidence of the battered woman syndrome. AB 591 (proposed, Feb 19, 1992). This bill, which also proposed the creation of a new class of manslaughter, see *supra* note 385, was never enacted.

In addition, AB 591 would have mandated the admission at trial of all relevant evidence on battering. The proposed amendment would have provided:

In any case in which a defendant charged with murder or manslaughter . . . raises as a defense . . . in order to establish [his or her] reasonable belief that the use of deadly force was necessary to defend against imminent peril to life or great bodily injury, [the defendant] shall be permitted to offer relevant evidence . . . that the defendant had been the victim of acts of domestic violence . . . by the deceased.

AB 591 (proposed, Feb. 19, 1991).

387. See *supra* notes 371-72, 378-79 and accompanying text.

a bill that would have influenced the clemency process by providing for a separate clemency board to consider battered women's petitions.³⁸⁸

Legislators in other states have sought to initiate the review of battered women's cases. The earliest such attempt, the "Texas Resolution,"³⁸⁹ appealed to the governor of Texas to use her authority to direct the review board in that state to investigate "the cases of all persons who pled to or were convicted of murder or manslaughter when the offense was directly related to victimization by domestic violence."³⁹⁰ The resolution provided, "Because of [unreasonable] standards of justification, victims who kill abusers in self-defense may nonetheless be convicted of or plead guilty to murder or manslaughter, even if the homicide occurred after years of well-documented abuse."³⁹¹ It provided that the Texas Board of Pardons and Paroles review all convictions of murder and manslaughter, after trial or upon a guilty plea, to look for evidence of battering. Many of the women identified were then expected to file petitions for commutation or pardon. Approximately 130 women have been identified as potential candidates. Of those identified by the Board, approximately thirty-five have provided evidence of battering sufficient to allow consideration of their cases to go forward.³⁹² It is estimated that approximately 300 women are in Texas prisons on murder or manslaughter con-

388. AB 2373 (vetoed Sept. 30, 1992).

389. Texas S.C.R. No. 26 (Apr. 26, 1991). See *supra* notes 348-49 and accompanying text for discussion of the history of the Texas Resolution.

In addition, legislators in New York debated an assembly resolution asking Governor Mario Cuomo to investigate the cases of all women convicted of murder or other felonies related to domestic violence. It urged him to review the cases with a view toward recommending commutations and pardons. Spencer, *Legislators Seek Release*, *supra* note 9. The assembly later urged Cuomo to direct his state parole board to consider the release of a specific group of battered women who had been self-identified. See Vivienne Walt, *Battered Women in Jail; Assembly Urges Clemency for 75*, *NEWSDAY*, Mar. 26, 1991 at 3. The resolution passed without debate. *Id.*

In both Texas and New York, authors or sponsors of the bills recognized that the measures were necessary because of the inability of women to present evidence of abuse at trial. See Walt, *supra* note 389 (quoting Helene Weinstein (D-Brooklyn)). See also Langford, *supra* note 348 (quoting a release by the Texas Council on Family Violence). However, the Texas measure also stated that victims of domestic violence face harsh penalties because of "unreasonable standards of justification," thus acknowledging that the standards for justified self-defense may themselves be a consideration. See UPI, Oct. 8, 1991, available in LEXIS, Nexis library, UPI file.

390. Texas S.C.R. No. 26 (Apr. 26, 1991). See also Langford, *supra* note 348.

391. See also UPI, *supra* note 389 (Oct. 8, 1991).

392. Telephone Interview with Jordan Faires, Texas Council on Family Violence (Dec. 2, 1992) (of the thirty-five potential candidates, fourteen had been referred to the Board of Pardons and Paroles by the special five-person board that initially screens the applications; the remaining approximately 100 potential candidates have either not yet provided information or have provided relatively little information). See also UPI, Oct. 8, 1991, *supra* note 389 (as of late 1991 more than 100 women had been identified by state officials and twenty-five had applied for clemency).

victions.³⁹³

The resolution also provided that prosecutors, judges, police, and victims' families be consulted prior to a clemency decision and be allowed thirty days to comment on the clemency petition. Then, a special five-member panel would review the cases and makes recommendations to the full parole board. Under Texas law, the governor may not commute the sentences of prisoners except on a favorable recommendation from the Board of Pardons and Pardons.³⁹⁴

Although the resolution is not a formal enactment, the process recommended in the resolution has been instituted and the review of convictions is underway with all the safeguards provided for in the resolution. Governor Ann Richards has expressed a desire to avoid the problems of a "blanket" clemency.³⁹⁵

The bill introduced by California Assemblyman Burton provided instead for a special Commission on Prisoner Pardons and Commutations. The commission would have operated under the governor's office, and its members would have been appointed by the governor.³⁹⁶

The final version of the bill presented to Governor Wilson did not provide that the commission actively investigate the cases in which the offense was directly related to victimization by domestic violence, although the bill as proposed initially by Assemblyman Burton did.³⁹⁷ Instead, after amendment in the California Senate, the bill provided that the commission review cases of persons convicted of killing a batterer, *who have applied for clemency*, "for evidence of repeated . . . physical, sexual, or psychological abuse to the prisoner by the victim."³⁹⁸ The commission would, after finding "evidence of repeated or continuous

393. Telephone Interview with Jordan Faires, Texas Council on Family Violence, *supra* note 392.

394. TEX. CONST. art. IV, § 11(b) ("In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, on the . . . recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and pardons . . .").

395. See Puente, *supra* note 14. However, the resolution was far-reaching in that it also directed the Texas Youth Commission and the Texas Juvenile Probation Commission to identify children convicted of killing family members in defense of themselves or others against an abuser. *Id.*

396. AB 2373 (vetoed, Sept. 30, 1992).

397. Assembly Committee on Public Safety, Hearing on AB 2373 (as introduced, Mar. 3, 1992), at 1.

398. AB 2373 (vetoed, Sept. 30, 1992). See also Kobil, *Mercy Strained*, *supra* note 3, at 622 (Kobil has proposed a separate clemency commission. He stated, "It is neither necessary nor desirable to follow blindly in the tradition of the royal prerogative and vest both of these aspects [justice-enhancing and justice-neutral exercises] of clemency entirely in the chief executive"). Kobil suggests a bifurcated clemency process, allowing a neutral professional board to make "justice-enhancing" clemency decisions. *Id.*

abuse,"³⁹⁹ have made recommendations to the governor on whether the petition should be granted or denied.

Groups opposed to the bill contended that the investigation procedure initially proposed (and followed in Texas) is an "outreach" review procedure that is too costly and burdensome; they contended that the prison grapevine would inform women of the opportunity to submit clemency petitions.⁴⁰⁰ Those voting for the bill thus assumed that women would learn of the review process and then apply for clemency, thus saving the commission the initial task of reviewing all cases in which women were convicted of murder or manslaughter after killing husbands or lovers. However, such an "outreach" review process could be important to a fair and systematic review. It could be done with the assistance of battered women's advocacy groups, and the cost may well be offset by the savings of thousands of dollars spent on incarcerating women who are appropriate candidates for executive clemency.⁴⁰¹

In addition, the legislation as amended provided that one prosecutor and one criminal defense attorney would sit on the panel, and all members would receive training on issues specific to domestic violence and battered woman syndrome.⁴⁰² It also provided that "due consideration shall be granted the interests of public safety in deliberations . . . ,"⁴⁰³ that the commission shall "evenhandedly review the evidence,"⁴⁰⁴ and that family members of victims would be afforded the right to present oral testimony or submit written evidence.⁴⁰⁵

Governor Wilson vetoed the bill, apparently determining that a sepa-

399. AB 2373 (August 26, 1992), at 2.

400. See Senate Committee on Judiciary, Hearing on AB 2373 (as amended, Mar. 12, 1992) (June 16, 1992).

401. The California Coalition for Battered Women in Prison, *see supra* notes 46-54 and accompanying text, has developed a questionnaire and formed a committee to identify battered women in prison for killing abusers. Telephone Interview with Minouche Kandel, California Coalition for Battered Women in Prison, *supra* note 19. The Texas Resolution provided for the identification and investigation of cases by the Texas Board of Pardons and Paroles, in conjunction with the Texas Council on Family Violence, a private non-profit advocacy group. See Texas S.C.R. No. 26 (Apr. 26, 1991). Such an outreach review procedure will entail some financial cost in forming a review group, implementing the questionnaire, contacting potential candidates for personal interviews, and other administrative costs. However, the financial cost of identifying the women should not be a determinative factor. The cost estimated for operation of the clemency commission is \$50,000 per year, a cost easily offset by the release of even three petitioners. See Ways and Means Committee Analysis, Hearing on AB 2373 (as amended Mar. 12, 1992) (Apr. 8, 1992) (cost of incarcerating each female prisoner for a twelve-month period is over \$20,000).

402. AB 2373 (passed, Aug. 26, 1992; vetoed, Sept. 30, 1992), at 2.

403. *Id.*

404. *Id.*

405. *Id.*

rate battered women's clemency decision process is an undesirable infringement on his exclusive authority. He stated:

Section 8 of Article V of the California Constitution confers sole authority on the Governor to grant pardons and commutations on the conditions the Governor deems proper. I take this responsibility very seriously, and I consider each case based on its own merits. ~~This bill is unnecessary. Under current law the Board of Prison Terms is authorized to bring to my attention the names of any life prisoners who are believed to deserve a pardon or sentence commutation, again, based on the merits of the individual case.~~

. . .

This bill would duplicate information I now obtain through existing sources and encroach on the authority exclusively reserved to the Governor by the constitution to exercise the power of pardon and commutation. My predecessors and I, as well as our successors, are unfettered in seeking information and counsel in the exercise of this important constitutional authority.⁴⁰⁶

The governor's contention that the bill would duplicate information he already receives is questionable. Under current law, the Board of Prison Terms is authorized "from time to time" to bring to the governor's attention the names of certain persons deserving of clemency.⁴⁰⁷ This bill would instead establish a separate commission to review a discrete class of convictions — those of battered women who killed, who were convicted, and who applied for clemency — and recommend action to the governor on each petition with credible evidence of a history of battering. Since the commission would report on all such petitions received from battered women who killed, it would go beyond the current authority of the Board of Prison Terms to report "from time to time" those cases deserving of clemency.

No California governor has granted clemency for justice-enhancing reasons to a battered woman who killed an abusive mate.⁴⁰⁸ It appears that the Board of Prison Terms has never recommended to a governor that he pardon a woman because her sentence is contrary to notions of

406. Governor Pete Wilson, *Veto Message* (Sept. 30, 1992).

407. CAL. PENAL CODE § 4801 (West Supp. 1992).

408. No grant of clemency appears to have ever been made to a battered woman in California other than to Birdie Foley, who had cancer of the esophagus and died two days later, in March 1992. See *supra* note 343.

justice. The amendment to Penal Code section 4801⁴⁰⁹ advises the Board of Prison Terms that the discovery of battered woman syndrome evidence may warrant recommendation to the governor that clemency be granted. But Assemblyman Burton's bill would add a process that would ensure that women who killed and applied for clemency had a thorough, independent inquiry into their cases. For these reasons, the review commission would be a new, or at least more complete, source of information for Governor Wilson.

In addition, it is doubtful that the commission would encroach on the governor's authority. Since the bill does not provide that the commission's recommendations are binding, it would not be a more "fettering" procedure than Penal Code section 4801, which already expressly authorizes the Board of Prison terms to make recommendations. The bill would merely provide that a separate commission, rather than the Board, review the cases. This fact alone should not make the clemency commission legislation any more constitutionally problematic than section 4801.

However, if the Board of Prison Terms, instead of the separate commission, were instructed to perform the same review and recommendation task for all women applying for clemency who had been convicted of murder and manslaughter, the same goals could be achieved. It is the special task of reviewing the cases for histories of abuse and making recommendations to the Governor that is important.

A separate board, with a prosecutor and criminal defense attorney, as well as some members of the general public who are not affiliated with the Board of Prison Terms, constitutes a more independent commission. However, the desire is for substance, not merely form. If the Board were issued a mandate to perform the same functions as the proposed commission the same goals could be achieved.

The potential sharing of the political risks with such a separate, independent commission should be valued, however. Kobil has argued for a separate clemency commission to evaluate and decide clemency petitions that involve justice-enhancing goals. Although he prefers removing the power to make justice-enhancing grants of clemency from the executive,⁴¹⁰ it is not necessary to remove it entirely from the auspices of the executive branch. It is probably best to keep it there, but to add standards and principles to the review procedure, and to allow the governor to

409. See *supra* note 371.

410. Kobil, *Mercy Strained*, *supra* note 3, at 622-23 ("[J]ustice-enhancing clemency decisions would be made by a professional board that is independent of the political pressures which inevitably distort the decisions of elected officials"). Kobil suggests a "democratized" board, with representatives of the general public, philosophers, clerics and those who have "traditionally . . . made up a large percentage of those incarcerated" *Id.* at 623.

appoint a professional board and adopt a policy of accepting as binding its recommendations, at least in cases involving justice-enhancing decisions.

At the same time, a mandate that is stronger than that proposed by the clemency commission would be ideal. Governor Wilson should instruct the Board of Prison Terms, or a separate commission independent of the Board, to *initiate* the review of all murder and manslaughter convictions (including those following a guilty plea) to look for evidence of battering. Such evidence might reveal that a battered woman defendant perceived the necessity to defend herself against imminent bodily harm, even if she does not identify herself as a battered woman and does not submit a clemency petition clearly stating so. The Board or commission would then make clemency recommendations on petitions filed by women identified as potential candidates.

Even if the governor neither issues a mandate to the Board nor forms a separate commission, the California Legislature could still adopt a resolution urging the governor to direct the Board of Prison Terms to review the cases of all women imprisoned for killing abusive mates. Although it may not be acknowledged or acted upon, a resolution would still be a welcome statement of support.

Governor Wilson seems to be asserting, in stating that the governor is "unfettered in seeking information and counsel in the exercise of [the clemency power]," that the power includes not just the final decision but *all* aspects of the process. It would appear, then, that any legislative enactments in California seeking to influence the process would be attacked as an unconstitutional infringement of the governor's function. However, the state constitution already delegates decisions regarding the *application process* to the legislature and the *granting* of pardon and commutation to the executive. It is not certain that a commission — a vehicle for bringing more cases deserving of clemency to the governor's attention — would restrict his ultimate decision. The commission as proposed would operate somewhere between the application process and the final grant of clemency. In no way do its recommendations bind or even interfere with the governor's power. The bill proposing the commission did not attempt to deprive the governor of the authority to grant clemency. As the governor stated, the Board of Prison Terms theoretically has this authority already.

(b) Important language changes to the Evidence Code

Governor Wilson has been receptive to much battered women's legislation. He signed the battered woman syndrome addition to the Evidence Code, the battered woman syndrome addition to the Penal Code, and the bill providing training in battered women's issues for the Board of Prison

Terms.⁴¹¹ However, he must also be receptive to legislation that distinguishes between the battered woman syndrome and evidence of everyday social and economic pressures that operate to explain why women stay in battering relationships and ultimately perceive imminent bodily harm from their abusers. The legislature has included important "experiences" language in recent proposed bills.

Earlier versions of AB 3436, which Governor Wilson eventually signed and which added battered woman syndrome to the list of causes in Penal Code section 4801 authorizing the Board of Prison Terms to recommend clemency, contained such language. It proposed that the Board of Prison Terms be able to consider battered woman syndrome and the experiences of battered women in recommending clemency.

In addition, AB 591, the bill that would have codified the decision of the California Supreme Court in *People v. Flannel*,⁴¹² included language regarding the experiences of victims of domestic violence. That bill proposed that Evidence Code section 1107, admitting expert opinion testimony on battered woman syndrome, be amended to include the following language:

(a) In a criminal action, expert testimony is admissible . . . regarding *experiences of victims of domestic violence*, battered, abused, or molested children's experiences, battered woman syndrome, or its equivalent resulting from the sequelae of the physical, emotional, or sexual abuse of a child, whether or not the sequelae are labeled a "syndrome," including the effects of physical, emotional, or sexual abuse upon the beliefs, perceptions, or behavior of victims of domestic violence, or child abuse⁴¹³

The language in these bills pertaining to battered women was included because of the perception that the battered woman syndrome may be, or has been interpreted to be, inadequate by itself to address the real-life experiences of many battered women who kill abusers. Such "experiences" language would ensure that battered women are allowed to present their full stories to courts. The language would allow courts to consider testimony from experts regarding the economic, emotional, and social reasons, including separation assault, that keep women in potentially harmful situations and ultimately lead them to defend themselves. Experts could testify to the developed sense of impending danger that battered women acquire, explaining for the jury why a woman has a reasonable belief that

411. See *supra* notes 189, 371-72, 378-79.

412. See *supra* notes 285-86 and accompanying text.

413. AB 591 (proposed, Feb. 19, 1991) (emphasis added).

she is in particular danger at the time she acts in self-defense.

Although the governor signed AB 3436, the final version of the bill did not include the "experiences" language because the governor indicated that he would not sign it containing that language.⁴¹⁴

Governor Wilson needs to do more to address adequately the concerns of battered women already imprisoned for killing abusers. He should provide for a separate commission to review the cases of battered women imprisoned for killing abusers. In his discretion, he could adopt a policy of giving binding effect, or at least a strong presumption of correctness, to that commission's recommendations. The commission should be seen as a way to share the political risk inherent in deciding the petitions, not as an infringement upon the governor's authority. The battered women's training that such a commission would receive pursuant to the Speier bill (or a separate bill requiring such training for all persons deciding battered women's clemency petitions) would make it likely that battered women who petition for clemency get a fair and unbiased consideration. With specific guidelines authorizing the recommendation of clemency in situations in which the petitioner has killed an abuser, battered women will receive the principled forum that they deserve to correct the injustice of their prison sentences.

CONCLUSION

The law of self-defense in many jurisdictions still does not provide equal treatment for women. In California, narrow and inflexible definitions and unreasonably objective standards operate to deprive women of the opportunity to present the affirmative defense. Women who kill their batterers have usually suffered violent unilateral abuse, yet it is evident from the cases on remand that an expert on battered woman syndrome does not ensure acquittal, even though a woman's actions may appear to be self-defensive. In addition, the battered woman syndrome cannot explain the reasonable actions of all battered women. It is proper for the executive to use the clemency power to release from prison those women who acted out of a fear of imminent danger of death or bodily harm. Notions of fairness, deserved punishment and society's interests all support that many battered women in prison in California and other states do not deserve to be imprisoned for acts in defense of themselves or others that can be considered morally and legally justified. By granting clemency, the Governor would be ensuring justice, not merely extending mercy, to the battered women in California prisons who killed to save their own lives or those of their children.

414. See *supra* note 374 and accompanying text.